

26
No. 2509

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

GRACE MUSTELL, as Administratrix of the Estate
of FRED G. MUSTELL, deceased, and as the per-
sonal representative of said FRED G. MUSTELL,
deceased, for and on behalf of GRACE MUSTELL
and RUTH MUSTELL, the widow and minor child,
respectively, of said FRED G. MUSTELL, deceased,

Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.**

Filed

OCT 31 1914

SHAW & BORDEN CO., SPOKANE, 149281

F. D. Monckton,
Clerk.

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NAMES AND ADDRESSES OF ATTORNEY'S
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CHARLES S. ALBERT and THOMAS BALMER,
Great Northern Passenger Station, Spokane, Wash-
ington,

Attorneys for Plaintiff in Error.

PLUMMER & LAVIN, Old National Bank Building,
Spokane, Washington,

Attorneys for Defendant in Error.

IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE EASTERN DISTRICT
OF WASHINGTON, NORTHERN
DIVISION.

GRACE MUSTELL as Administra-
trix of the estate of FRED G.
MUSTELL, deceased, and as the
personal representative of said
FRED G. MUSTELL, deceased,
for and on behalf of Grace Mus-
tell and Ruth Mustell, the widow
and minor child respectively, of
said Fred G. Mustell, deceased,

Plaintiff,

vs.

THE GREAT NORTHERN RAIL-
WAY COMPANY, a corporation,

Defendant.

Amended Complaint.

Comes now the above named plaintiff and for am-
ended complaint, and for the purpose of carrying
out the order of the court in making paragraphs seven
and sixteen of plaintiff's original complaint more de-
finite and certain, files and serves this her amended
complaint and alleges:—

I.

That the Great Northern Railway Company, the above named defendant, is and was, at all times herein mentioned, a railroad corporation created, organized and existing under and by virtue of the laws of the State of Minnesota, and owning, operating and controlling a line of transcontinental railroad within and through the States of Minnesota, North Dakota, Montana, Idaho and Washington, for the transportation of freight and passengers, and owning, operating and controlling trains of cars running on said railroad line through and between said states, and engaged in carrying on the business of interstate commerce by railroad as a common carrier.

II.

That on to-wit: the 29th day of September, 1913, Fred G. Mustell died by reason of the injuries received at the town of Hillyard in the Division yards of said defendant.

III.

That Grace Mustell, during the life of said Fred G. Mustell, was his wife, and is now his surviving widow, and said Ruth Mustell is the surviving minor child of said Fred G. Mustell, and said Grace Mustell is administratrix of the estate, and the personal representative of said Fred G. Mustell, deceased, and bring this suit as said administratrix and personal representative, and on behalf of herself as the surviving widow and on behalf of Ruth Mustell, the minor child of said Fred G. Mustell, deceased, under and by virtue of the

provisions of that certain act of Congress of the United States known as the "Federal Employers' Liability Act."

IV.

That at the time of the death of said Fred G. Mustell, and at the time he received the injuries which caused his death, he was in the employ and working for the above named defendant as a car checker in the division yards at Hillyard, Washington, and was, at the time of receiving the injuries hereinafter mentioned, in the performance of his duty and doing and performing acts and things necessary to be done and carried out for and on behalf of said defendant in carrying on and performing its business of interstate commerce by railroad as a common carrier, and his employment and the duties he was performing were an integral part of said business of interstate commerce by railroad, and by reason of the duties which were being performed by said Fred G. Mustell at the time of his injuries he was, at said time, employed by said defendant in interstate commerce by railroad.

V.

That Hillyard, Washington, is a division point on the line of said railroad where trains of cars coming from the west and from eastern states are broken up and trains of cars switched in such a manner as to make up trains for a continuation of the journeys of said trains, both interstate and intrastate, and for such purpose said defendant had, and has at all times employed continuously certain switching engines and engine crews engaged in switching and making up

said trains in and upon the several railroad tracks in said division yards.

VI.

That at the time of the happening of the injuries to said deceased said defendant had within its yards at said Hillyard numerous trains of cars, switching engines and other railroad equipment, and it was the duty of said deceased as a car checker, in which duty he was engaged at the time of his death, to go through, upon, over and across the numerous and several tracks in said yards for the purpose of securing data and records of the several cars coming in over said divisions, both from the east and west, and to make a record of the car seals, car numbers and the origin and destination of the cars brought in by the several trains of defendant, which data, records and facts were written down by said deceased, and said information conveyed by him to the office of defendant in said yards for the purpose of keeping a record thereof and to enable said defendant to handle and use said cars according to, and consistent with the information and record taken down and made by said deceased.

VII.

That at the time deceased received his injuries which caused his death he had been out, through and upon said yards and tracks making a record of said cars upon one of said tracks in said yards, as aforesaid, and obtaining and recording the information therein, thereon and thereabout received, and was carrying said record and information to the office of the company for

the purpose aforesaid, and while passing over and upon track known as track No. 1 in said yards, a line of about fifteen freight cars that was standing still at the time said Fred G. Mustell started across said track No. 1 were, by the negligent and careless acts on the part of the switching crew as aforesaid and as hereinafter alleged, in the employ of defendant, suddenly and violently moved forward and upon said Fred G. Mustell, knocking him down, running over him, causing injuries which resulted in his death on the same day.

VIII.

That said string of fifteen standing cars aforesaid was coupled in to by another string of cars moving easterly on said track No. 1 to which was attached a locomotive switching engine in charge of the switching crew of said defendant, and said fifteen standing cars, after being coupled up with said other cars, was moved forward a distance of from two to four car lengths before they were stopped.

IX.

That according to the custom and usage of switching crews handling and switching cars in the Hillyard yards at the time of the death of Fred G. Mustell, and for more than twelve years prior thereto, it was the duty of said switching crew not to cause said string of fifteen standing freight cars, which struck and injured said Mustell, to be moved forward for any purpose unless a man was placed and standing upon the front end of said string, to-wit: the end which struck said Mustell, for the purpose of protecting said end of said

string of cars from coming in contact or in collision with anything or any person, and to protect persons who might be in and about said tracks in the performance of their duties, or at all. That said Fred G. Mustell knew of said custom, usage and duty, and relied thereon and believed that said string of cars would not move unless said man was placed on the end of said string of cars according to said custom; that said defendant negligently and carelessly moved said cars forward violently and suddenly, wholly in violation of said custom and usage, and wholly failing and neglecting to cause to be placed upon the end of said car or string of cars as aforesaid, and for the purpose aforesaid, said man. That said string of cars by reason of the negligence and carelessness of the said switching crew in handling their switching operations at said time and place, moved so violently, quickly, unexpectedly and without warning so that the said Fred G. Mustell was unable, in the exercise of reasonable care on his part, to escape from being run down and injured by said cars.

X.

That in handling switching operations in said yards it is usual and customary that said engine and cars be moved with reasonable care and without unnecessary violence, bumping and colliding, and that the movement of said string of cars that struck said Fred G. Mustell was wholly unnecessary, could not have been anticipated by deceased, Fred G. Mustell, and the violence and the manner in which they were moved was of an extraordinary character, and not the usual manner

in which cars are moved in order to accomplish the results desired by said switching crew.

XI.

That the employes of said defendant in performing said switching operations and in handling said strings of cars which caused the injury and death to said deceased were at said time in the employ of defendant and doing and performing an integral part of the acts and things necessary to be done for and on behalf of defendant in carrying on its business of interstate commerce by railroad as a common carrier, and said employes were at said time employed in said commerce.

XII.

That just prior to the injury received by said Fred G. Mustell as aforesaid, he was engaged and employed by defendant in obtaining the name, number and car seals of certain cars in the yards at Hillyard, Washington, for the purpose aforesaid, and at the time of his injury was engaged in returning to the depot of the company in said yards at Hillyard for the purpose of delivering the record of said cars made by him containing said information to the company.

XIII.

That the name, numbers, origin and destination of each of the cars which were checked by said Mustell, and from which he obtained the information and data which he was conveying to the depot at the time of his injury is as follows:

XIV.

Name of Car	Number	Freight contained therein	Destination
G. N.	220576	Coal	Vancouver, B. C.
"	126129	Coal	Vancouver, B. C.
"	110593	Cement	Vancouver, B. C.
"	25604	Concentrates	Tacoma, Wash.
"	210653	Coal	Vancouver, B. C.
"	208616	Coal	Vancouver, B. C.
"	103292	Coal	Vancouver, B. C.
"	74359	Coal	Vancouver, B. C.
"	100348	Concentrates	Tacoma, Wash.
"	126196	Coal	Vancouver, B. C.
"	105628	Concentrates	Tacoma, Wash.
"	111160	Cement	Vancouver, B. C.
"	24876	Wood	Spokane, Wash.
"	22495	Wood	Spokane, Wash.
"	112023	Wood	Spokane, Wash.
"	27270	Lumber	Spokane, Wash.
"	72007	Clay	Spokane, Wash.

That prior to and at the time of the moving of said string of cars which struck and injured said Mustell there was no man stationed upon top of said cars at any place whatsoever.

XV.

That the information and data obtained by said Fred G. Mustell just prior to his injury, and which he was conveying to the depot of the company was obtained by him for the use of the company so that said company could properly switch and make up its trains and cars and be guided to some extent in making up and switching said cars and trains by the

information received and obtained by said Mustell in the performance of his duties as car checker.

XVI.

That defendant in carrying on its switching operations in and about its yards at Hillyard, and in handling cars and making up trains defendant failed and neglected to provide, prepare, promulgate or enforce any sufficient rule or rules, regulation or regulations, or in fact, any regulations or rules at all in said switching operations and the handling of cars and engines in said yards for the purpose of warning other employes, and particularly said Fred G. Mustell, of any threatened danger of which he might not be in a position to be advised at the time, and the rules, if the same had been promulgated and enforced, would have eliminated a large part of the dangers incident to the duties of said Fred G. Mustell which he was performing at the time of his injury. That the company failed and neglected to provide, promulgate or enforce any rules in and about said switching operations, knowing, and by the exercise of reasonable care ought to have known, that unless some rule or regulation was promulgated and enforced with reference to said switching operations great danger would exist to the other employes who were required to go in and about the cars, tracks and switches while said switching operations were going on. That if reasonable rules had been promulgated and enforced so as to have advised said Fred G. Mustell of the danger threatening him immediately prior to his injuries and said rules and regulations had been enforced with reference

to said switching operations to the end that all persons whose duties called them in and about said cars and tracks would have warnings of threatened dangers, then said Fred G. Mustell would not have been injured and would not have been killed, and the failure to promulgate and enforce said rules or some reasonable rules was one of the contributing causes of the injury and death of said Fred G. Mustell.

That in said yards at Hillyard and the particular part thereof and adjacent thereto was situated the company's machine shops, round house, depot and other buildings in and about which large numbers of men are constantly employed and working, and all of said men are required at different times of the day to be in and about, over and across the tracks of said company in the performance of their duties during the time that switching operations are being conducted and carried on. That plaintiff's intestate and other employes were required in and about the performance of their duties to go over and across said tracks and in between strings of cars and trains of cars in the performance of their duties during switching operations, and often it would be impossible to see or determine just what cars were liable to be moved and thereby injure those working in and about or using said yards in the performance of their duties, and in order to avoid injuring, or the possibility of injuring said employes, including plaintiff's intestate, it was necessary that rules be promulgated and enforced which would make it the absolute duty of switching crews and those operating switching engines to give some warning

that said cars were being moved by said switching engines, or about to be moved, either by blowing the locomotive whistle or by ringing the locomotive bell, or by placing a man on the far end of the cars to be moved or bunted into other cars so as to warn those who might be passing over said track close to, or in the vicinity of said cars about to be moved, to the end that plaintiff's intestate and others using said tracks, as aforesaid, would not be placed in a dangerous position without being able to know, understand or appreciate the dangers incident to the promiscuous moving of cars suddenly and violently, and if rules were not promulgated and enforced requiring the engine bell to be rung when said cars were about to be moved or the whistle blown giving a signal in some manner which would be understood by those using said tracks in the performance of their duties, as aforesaid, and if a man was not placed at the head end of said cars to notify persons passing over said tracks of their intention to move said cars or said man placed in some position so as to give said warning then the company should have adopted some other efficacious rule or plan so that said employes working in and about said cars in passing and repassing between and past the same should not be placed in a position of danger without their knowledge or warning being given them. That if said rules had been promulgated and enforced instead of the company relying upon a custom among railroad men in the yards at Hillyard to give the warning hereinbefore pleaded, and violation of the rules would have meant a discharge or suspension of the employe violating the same, it would have been a

greater influence and tended to eliminate the dangers incident to the work of plaintiff's intestate and other employes, but in truth and in fact the said company promulgated no rules whatsoever, relied upon the haphazard custom, depending largely upon the whim or caprice of the particular switching crew who might be handling cars, whereas, if a positive rule of the company was promulgated and enforced and the failure to enforce was followed by discharge or suspension, then said rule would be invariably obeyed, and whereas the violation of the custom is often and usually disregarded and followed by no penalty for so doing.

XVII.

That by reason of said car running over and upon said Fred G. Mustell he was greatly cut, mangled, maimed and seriously injured, which caused extreme and excruciating pain and suffering during the time that he lived, to his damage in the sum of Ten Thousand Dollars, (\$10,000.00), and for which he had a cause of action against defendant by reason of the allegations, matters and things herein pleaded, and by reason of said cause of action surviving the said Grace Mustell demands and claims said sum of Ten Thousand Dollars, (\$10,000.00), as and for the injuries, pain and suffering sustained by said Fred G. Mustell during his life time, in addition to the other damages hereinafter pleaded on behalf of the beneficiaries hereinafter mentioned.

XVIII.

That by reason of the injuries received by said Fred G. Mustell he thereafter died, and by reason of

his death and the facts hereinbefore pleaded, and by reason of the negligence and carelessness on the part of said defendant, its agents and servants, said Grace Mustell, as the widow of said Fred G. Mustell, and his beneficiary, and on account of his death, has been and is damaged in the sum of Thirty-five thousand Dollars, (\$35,000.00), and the said Ruth Mustell, the surviving minor child of said deceased, Fred G. Mustell, has been and is damaged in the sum of Fifteen Thousand Dollars, (\$15,000.00), making a total amount to which plaintiffs have been damaged as herein pleaded, in the sum of Sixty Thousand Dollars, (\$60,000.00).

WHEREFORE, plaintiff demands judgment against the above named defendant for the sum of Sixty Thousand Dollars, (\$60,000.00), and costs and disbursements.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
COUNTY OF SPOKANE.—ss.

Grace Mustell being first duly sworn deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint, knows the contents thereof, and that the same is true, as she verily believes.

(Signed) GRACE MUSTELL.

Subscribed and sworn to before me this 30th day of July, 1914.

(Seal) (Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
residing at Spokane.

Endorsement: Service admitted this 18th day of August, 1914.

(Signed) CHARLES S. ALBERT,
Attorney for Defendant.

Amended Complaint, filed September 1st, 1914.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Answer to Amended Complaint.

Now comes the above named defendant and for its answer to the amended complaint of the plaintiff herein, and

I.

AS A FIRST DEFENSE THERETO:

1. Admits that it is now, and during all the times mentioned in the amended complaint has been, a railway corporation, created, organized and existing under and by virtue of the laws of the State of Minnesota, and that it does now, and during all of said times has owned, operated and controlled a line of railway from the City of St. Paul in the State of Minnesota, to and through the States of North Dakota, South Dakota, Montana, Idaho and Washington, for the transportation of freight and passengers, and is and has been during a part of the time and at some places engaged in interstate commerce and part of the time and at some place in intrastate commerce.

2. Said defendant admits that on the 29th day of

September, 1913, Fred G. Mustell died from the result of injuries received at Hillyard, Washington.

3. Said defendant admits that the said Grace Mustell is the surviving widow and said Ruth Mustell is the minor child of said Fred G. Mustell, and that said Grace Mustell is the administratrix of said estate.

4. Said defendant admits that at the time of the injuries to and death of said Fred G. Mustell, part of the employment of said Fred G. Mustell was a car checker in its yards at Hillyard, and said defendant admits that Hillyard, Washington is a division point on the line of said defendant's railway, and that trains are made up and broken up in said yards, and cars are switched in said yards; that some of said cars come from foreign states and some go to foreign states and that others do not, and said defendant admits that it has at all times employed continuously switching engines and crews engaged in the switching and making up of trains in and upon the several railroad tracks in its said yards.

5. Said defendant admits that at the time of the happening of the injuries to said Fred G. Mustell, said defendant had within its yards at Hillyard numerous trains of cars, switching engines and other railroad equipment.

6. Said defendant admits that it was part of the duties of said Fred G. Mustell to pass over and across the tracks in said yards, for the purpose of checking the cars in said yards, and that said checking was made for the purpose of furnishing the defendant with in-

formation. Said defendant admits that immediately previous to the death of the said Fred G. Mustell, he had been among other things checking cars in said yards, and that while upon Track No. 1 in said yards he came in collision with a freight car upon said track.

8. Said defendant further admits that said car which collided with the said Fred G. Mustell was coupled onto a string of cars and that said string of cars moved a distance not to exceed four car lengths before said car stopped.

9. Said defendant specifically denies each and every allegation of Paragraph IX of said complaint.

10. Said defendant specifically denies the allegations of Paragraph X of said amended complaint.

11. Said defendant admits that at the time of the injuries to and death of said Fred G. Mustell, said defendant's employes were engaged in switching cars in said yards.

12. Said defendant admits that immediately prior to the injuries to and death of said Fred G. Mustell, part of the work which he was engaged in was that of a car checker; that he was going from one of the tracks in the yards of said defendant over and across another of said tracks in said yard.

13. Said defendant admits that the name of the cars, numbers and freight contained therein and destination thereof which said Fred G. Mustell had checked immediately previous to his injuries and death are as set forth in Paragraph XIII of said amended complaint.

14. Said defendant admits the allegations of Paragraph XIV of said amended complaint.

15. Said defendant admits that prior to his death said Fred C. Mustell was conveying to the defendant's depot certain information and data contained upon his checking list; that said information was obtained by him for the use of defendant so that said defendant could switch and make up its trains and cars, and be guided to some extent in making up and switching said cars and trains by such information.

16. Answering Paragraph XVI of said amended complaint, said defendant admits that in and about the yards at Hillyard are located certain shops of the said defendant, and that a number of men were employed in and about the same, and that some of said employees were required to go over and across the tracks of the said defendant. Further answering said Paragraph XVI of said amended complaint, said defendant specifically denies each and every allegation thereof.

17. Said defendant alleges that the injuries received by the said Fred G. Mustell resulted almost immediately in his death. Said defendant specifically denies that the said Fred G. Mustell had any cause of action against the said defendant, either in the sum of ten thousand dollars or in any sum whatever.

18. Said defendant specifically denies that the said Grace Mustell has been damaged by reason of any acts or negligence on the part of the defendant, either in the sum of thirty-five thousand dollars or in any sum whatever, or that the said Ruth Mustell has been damaged by reason of any acts or negligence on the

part of said defendant, either in the sum of fifteen thousand dollars, or in any sum whatever, or that plaintiffs have been damaged by reason of any acts or negligence on the part of said defendant, either in the sum of sixty thousand dollars or in any sum whatever.

19. Said defendant denies each and every allegation, matter and thing in said amended complaint contained, except as has been hereinbefore specially admitted.

Further answering said amended complaint and

II.

FOR A SECOND DEFENSE THERETO:

1. Re-affirms and re-alleges all those matters and things as set forth and contained in Paragraphs 1 to 19, inclusive, of said defendant's first defense hereto.

2. Denies each and every allegation, matter and thing in said amended complaint contained, except as is hereinafter specifically admitted.

3. Said defendant alleges that the injuries to and death of the said Fred G. Mustell were not caused by any acts or negligence on the part of said defendant, but alleges that the same were caused by his own carelessness and negligence, and that such carelessness and negligence were an efficient cause of his death, and contributed to cause the same.

III.

Said defendant further answering said amended complaint, and for a third defense thereto:

1. Re-alleges and re-affirms all these matters and

things as set forth and contained in Paragraph 1 to 19, inclusive, of said defendant's first defense hereto.

2. Denies each and every allegation, matter and thing in said amended complaint contained, except as is hereinafter specifically admitted.

3. Said defendant alleges that the said Fred G. Mustell at and previous to the time he met his death, as aforesaid, knew the dangers of his employment, of the uses of the ways, works, means, appliances, instrumentalities and servants which were being used at the time and place he met his death, in the condition and in the manner in which the same were being used and operated at said time and place, and that he appreciated the dangers thereof, and assumed the risks thereof.

WHEREFORE, said defendant demands judgment that plaintiff take nothing by her complaint, and that it be hence dismissed with its costs and disbursements herein.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Defendant.

P. O. Address:

Great Northern Passenger Station,

Spokane, Washington.

STATE OF WASHINGTON,
COUNTY OF SPOKANE.—ss.

Charles S. Albert, being duly sworn, on oath says: that he is one of the attorneys for the defendant, Great Northern Railway Company, in the above-entitled cause; that he has read the foregoing answer to amended complaint, knows the contents thereof; and he believes the same to be true.

That defendant is a foreign corporation, is not within said county, is incapable of making the affidavit of verification herein, is absent from said county, and has no officer within the same authorized to make the verification, other than its attorneys, one of whom is affiant, who is duly authorized so to do and that the reason for this affiant making this verification is hereinbefore immediately set forth.

(Signed) CHARLES S. ALBERT.

Subscribed and sworn to before me this 31st day of August, 1914.

(Signed) HERBERT H. SIELER,
Notary Public in and for the State of Washington,
residing at Spokane, Wash.

(Notarial Seal)

Endorsements: Answer to Amended Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, September 1, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Depty.

Title of Court and Cause).

Reply.

Plaintiff for reply to the affirmative matter contained in defendant's answer says:

I.

Denies that the injuries received by the said Fred G. Mustell resulted immediately in his death, but alleges that said deceased lived several hours after the infliction of said injuries as alleged in paragraph 17 of defendant's answer.

II.

Denies each and every allegation, matter and thing contained in paragraph three of subdivision two designated defendant's "second defense to plaintiff's complaint.

III.

Denies each and every allegation, matter and thing contained in subdivision three of paragraph three of defendant's answer.

WHEREFORE, having fully answered plaintiff prays as in her original complaint.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
COUNTY OF SPOKANE.—ss.

Grace Mustell being first duly sworn deposes and says; that she is the plaintiff in the above entitled action; that she has read the foregoing reply, knows the contents thereof, and that the same is true, as she verily believes.

(Signed) GRACE MUSTELL.

Subscribed and sworn to before me this 1st day of September, 1914.

(Seal) (Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
residing at Spokane.

Endorsements: Service admitted this 1st day of September, 1914.

Attorney for Defendant.

Reply.

Filed in the U. S. District Court for the Eastern District of Washington, September 1st, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

General Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs in the sum of \$5,750, and apportion the amount of the recovery as follows: to the widow, Grace Mustell, the sum of \$3450.00; to the infant child, Ruth Mustell, the sum of \$2300.00.

(Signed) F. P. FRENCH,
Foreman.

Endorsements: General Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, September 22, 1914.

W. H. HARE, Clerk,

(Title of Court and Cause).

Special Findings.

(1) Was the train movement which causes the death of Fred G. Mustell a "running switch" within the intent and meaning of the rules of the defendant company?

Answer: No.

(2) Was it the custom of the defendant to place a man on the head car when moved in the manner the car in question did move, and did Mustell rely on this custom?

Answer: No.

(3) Were the cars which struck Mustell moved in a manner extraordinary or unusual?

Answer: Yes.

(4) Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell?

Answer: No.

(5) Did Mustell assume the risk?

Answer: No unusual risk.

(6) Was the negligence of Mustell the sole cause of his death?

Answer: No.

(Signed) F. P. FRENCH,
Foreman.

Endorsements: Special Findings of Jury.

Filed in the U. S. District Court for the Eastern District of Washington, September 22, 1914.

W. H. HARE, Clerk.

(Title of Court and Cause).

Motion For New Trial.

Comes now the above named plaintiff and moves the Court to set aside the verdict of the jury and grant a new trial of the above entitled cause on the following grounds, to-wit:

I.

Inadequate damages appearing to have been given under the influence of passion or prejudice.

II.

Error in the assessment of the amount of recovery.

III.

Insufficiency of the evidence to justify the verdict and that the same is against law.

IV.

Misconduct of the jury.

V.

Error in law occurring at the trial.

VI.

Specifying with more particularity plaintiff alleges: That the damages awarded by the jury are wholly and totally inadequate; that if plaintiff was entitled to recover under the evidence, then the amount of damages awarded is wholly inadequate and there is no evidence in the case or at the trial which justifies the small amount of said verdict; that according to the undisputed evidence, if plaintiff is entitled to recover she is entitled to a much greater sum, and if, under the evidence, she is not entitled to recover, then the jury should not have awarded any damages whatsoever.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Service admitted this 22nd day of September, 1914.

(Signed) CHARLES S. ALBERT,
Attorney for Defendant.

Motion for New Trial.

Filed in the U. S. District Court for the Eastern District of Washington, September 23, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Motion For Judgment Notwithstanding the Verdict.

Now comes the defendant above named, and moves this Court for an order, vacating and setting aside the verdict rendered in said action on the 22nd day of September, 1914, in favor of the plaintiff, and for judgment in favor of the defendant notwithstanding such verdict, upon the following grounds:

1. That neither the evidence nor the testimony shows or tends to show, either directly or indirectly, that the defendant or anyone for whom it was responsible, was guilty of any negligence, but on the contrary conclusively shows that the defendant exercised all the duties imposed upon it by law, and that said defendant used the care required to furnish the plaintiff's intestate a reasonably safe place in which to work.

2. That no cause of action against the defendant, in favor of the plaintiff has been proven.

3. That no cause of action against the defendant has been proven under the Act of Congress relating to the liability of common carriers by railroad to their employes in certain cases, approved April 22nd, 1908, as amended April 5, 1910, known as the Federal Employer's Liability Act.

4. That the evidence and testimony adduced on the part of the plaintiff and also that adduced on the whole case, shows, as a matter of law, that the plaintiff's intestate assumed the risks and dangers to which he was exposed, if any, and that it was part of the consideration of his employment and part of his duty under such employment to assume such risks and dangers, if any

there were, which directly or indirectly brought about the accident sued upon.

5. That the evidence and testimony shows that the said plaintiff's intestate knew of the danger which caused his injuries, which evidence and testimony conclusively shows, as a matter of law, that plaintiff is not entitled to a verdict herein, but that the said defendant is and was entitled to a verdict, and is entitled to judgment against the plaintiff.

6. That the evidence does not show that the defendant negligently or carelessly moved the car which came in collision with plaintiff's intestate violently, or with unnecessary violence, or that said movement was unnecessary, or that the violence or manner in which the same was moved was of an extraordinary character or was an unusual manner, or that the collision between said car and said Mustell was caused by reason of negligence or carelessness on the part of the switching crew in handling the switching operations at the time and place when said collision occurred, or that said car was moved without reasonable care by the said defendant.

7. That the jury having found specially with reference to the other particulars alleged in said complaint of negligence on the part of said defendant, and there being no evidence in support of the charge of negligence referred to in the last ground of this motion, no cause of action against the said defendant has been proven or shown herein.

8. That the evidence is insufficient to sustain a verdict for the plaintiff, upon the ground that the evidence and findings of the jury show that upon all other grounds alleged in the complaint, except upon the

ground mentioned in Paragraph 6, that the defendant was not negligent and that with reference to such ground the evidence conclusively shows not only that the said car was not moved in a careless, negligent, unusual or extraordinary manner, but does show that said car was moved in the ordinary and usual manner of moving such cars.

This defendant in making this motion for judgment notwithstanding the verdict expressly waives any and all right to a new trial or another trial in this action and makes no motion therefor, and requests that no new trial of said action be granted, but, on the contrary, said defendant makes this motion to vacate and set aside the verdict in favor of the plaintiff and for judgment in favor of the defendant notwithstanding such verdict.

Said motion is based upon the findings and papers on file, upon the minutes of the Court, including not only the clerk's minutes and any notes and memorandum which may have been kept by the judge of this Court in the trial thereof, but also the reporter's transcript of his shorthand notes of said trial.

Dated at Spokane this 29 day of September, 1914.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

Endorsements: Due service of the within motion by a true copy thereof, is hereby admitted at Spokane, Washington, this 29th day of September, 1914.

(Signed) PLUMMER & LAVIN ,
Attorneys for Plaintiff.

I certify that the filing of the within motion is allowed this 30th day of September, 1914.

(Signed) FRANK H. RUDKIN,

Judge.

Motion for Judgment Notwithstanding the Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, September 29, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Order Denying Motion for New Trial.

This cause coming on to be heard upon plaintiff's motion for a new trial of the above entitled cause, the above named plaintiff appearing by Plummer & Lavin, her attorneys, urging said motion, and the above named defendant appearing by Chas S. Albert and Thomas Balmer, its attorneys of record, resisting said motion, and after hearing said motion and the argument of counsel for the respective parties, and the Court being fully advised in the premises, it is hereby

ORDERED: that said motion for a new trial be, and the same is hereby denied, to which plaintiff excepts and exception is allowed.

Done in open Court this 2nd day of October, 1914.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements. Order Denying Motion for New Trial.

Filed in the U. S. District Court for the Eastern District of Washington, October 2, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Order Denying Motion for Judgment Notwithstanding Verdict of Jury.

This cause coming on to be heard upon defendant's motion for judgment notwithstanding the verdict of the jury, the above named defendant appearing by Chas. S. Albert and Thomas Balmer, its attorneys of record, urging said motion, and the above named plaintiff appearing by Plummer & Lavin, her attorneys, resisting said motion, and after hearing said motion but no argument thereon and the Court being fully advised in the premises, it is

ORDERED: that said motion be, and the same is hereby denied, to which ruling defendant excepts and its exception is allowed.

Done in open Court this 2nd day of October, 1914.

(Signed) FRANK H. RUDKIN,
Judge.

O. K. as interlined to form only.

(Signed) CHARLES S. ALBERT,
Attorney for Defendant.

Endorsements: Order Denying Motion for Judgment Notwithstanding Verdict.

Filed October 2, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Judgment.

This cause heretofore coming on to be heard in open Court before the Court and a jury, and after the parties had concluded their testimony the Court instructed the

jury, and the jury retired to deliberate upon their verdict, and thereafter said jury appeared in Court and reported a verdict in favor of plaintiff and against the defendant in the sum of Five Thousand, Seven Hundred and Fifty (\$5750.00) Dollars.

Now, therefore, upon the verdict of said jury and the evidence adduced and the law of the case, and the Court being fully advised in the premises, it is

ORDERED and ADJUDGED: that plaintiff, Grace Mustell, as Administratrix of the estate of Fred G. Mustell, do have and recover of and from the above named defendant, the Great Northern Railway Company, the sum of Five Thousand, Seven Hundred and Fifty (\$5750.00) Dollars, and costs and disbursements herein taxed at \$116.10.

Done in open Court this 2nd day of October, 1914.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Judgment.

Filed in the U. S. District Court for the Eastern District of Washington, October 2, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to-wit, on the 18th day of September, A. D., 1914, one of the days of the September Term of the United States District Court for the Eastern District of Washington, Northern Division, before the Hon. Frank H. Rudkin, Judge

of said Court Presiding, this case came on for trial on the pleadings heretofore filed herein.

This was an action at law to recover damages for the death of plaintiff's intestate, alleged to have occurred by said intestate's being run into by a box car of the defendant in the yards of the defendant at Hillyard, Washington, on the 29th day of September, 1913.

Plaintiff appeared in person and by Messrs. Plummer & Lavin, her attorneys, and the defendant appeared by Charles S. Albert and Thomas Balmer, its attorneys, and a jury being duly empanelled and sworn to try the case, the following proceedings were had and testimony taken.

An opening statement to the jury was made by Mr. Plummer for the plaintiff.

Thereupon the following proceedings were had:

The defendant by its attorney, Charles S. Albert, moved the Court to exclude from the jury the consideration of any negligence with reference to the alleged failure to tie down cars in the yard at the time of the happening of the accident. Whereupon Mr. Plummer for the plaintiff, stated that he admitted that they were tied down, and did not intend to claim any negligence by reason thereof.

Thereupon Henry Cantley being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of HENRY CANTLEY.

My name is Henry Cantley. I am employed by the Great Northern as car checker in the Hillyard yards. I recall the injury and death of Fred Mustell, and was present at the time.

Testimony of HENRY CANTLEY.

Whereupon the following proceedings were had:

Map marked Plaintiff's Exhibit 2 was given to the plaintiff by defendant and it was stipulated that it correctly showed the location of the tracks, buildings and yard and measurements around the vicinity of the accident; that it was drawn to scale one inch to fifty feet, and was admitted in evidence.

I was with him at the time he was struck by the cars. We had just finished checking a freight train when it came in. We were taking the records of the seals and he was marking the destination of the cars, and after we had got that done we were going to the depot and turn in our checks, records of these cars. The place marked "A" on the map shows the place where he was struck. The place marked "B" shows the direction we were going to. The main line is north of Track 1. Think we had finished checking the last cars on Track 5. He and I were crossing about the same time when he got hit.

Whereupon the following proceedings were had:

BY MR. PLUMMER: Q. When you got to track No. 1, or close to track No. 1, as I understand, you and he were crossing about the same time, weren't you, when he got hit?

A. Yes, sir.

Q. When you got close to track No. 1 state whether or not you saw any indication of any train or cars, or backing against this string of cars, that caught Mr. Mustell or anything to indicate that anything was being moved on that track No. 1 in the direction of this string of cars that struck Mustell?

Testimony of HENRY CANTLEY.

A. Well, as we were crossing there we were not paying particular attention to that.

Q. I did not ask you that, Mr. Cantley, I am asking you if you saw anything.

A. I cannot say that I did or did not because we were not paying any attention.

Just before crossing I glanced up that way and saw an indication where the switch engine was by the smoke. I just saw the smoke coming out of there. I supposed out of the engine up there.

Whereupon the following proceedings were had:

BY MR. PLUMMER.

Q. How was that smoke being thrown out? What I want to find out is this whether it was going straight up or whether it was being thrown from the engine as the engine moved, just the facts with reference to the smoke, that is what I want to get at.

A. Well, it was going apparently straight up.

Q. How long have you worked there in the yards, Mr. Cantley?

A. I just begun the first part of the month.

Q. When the smoke is going straight up, what does that indicate according to your experience there in the yard, with reference to the engine standing still or going?

A. Well, I don't know; I can't very well say because sometimes when they are working hard they go straight up, and other times they don't.

Q. Now, Mr. Cantley, did you hear any engine moving?

Testimony of HENRY CANTLEY.

A. Well, I cannot say because they were moving—

Q. Just answer yes or no, if you heard any; now, you can say that, can't you, yes or no?

A. No, I cannot and say it truthfully because—

Q. Cannot say whether you did or did not?

A. No sir.

I didn't see any cars moving on this track.

Q. What was the first indication to you that cars were moving on that track No. 1, if they were moving?

A. I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.

Whereupon the following proceedings were had:

MR. PLUMMER: Q. Just state the relation between the coming together of the string of cars onto the cars that were standing still that you say you heard the crash,—the relation between the crash and the movement of this car that hit Mustell; what I want to get at is, whether or not it was simultaneous or otherwise.

A. Well, it moved very quickly afterwards; you know how it would be when coupling is made, how quickly the cars would move.

Q. Well, I don't know, I don't know whether the jury would or not; but I just want to know whether there was any taking up of slack or anything of that kind before the other one moved, or whether as soon as the crash came the car that struck Mustell moved practically the same time.

A. Yes sir.

Sometimes the tracks in the yards are crowded and

Testimony of HENRY CANTLEY.

other times they are not very many cars on them. On Track 2 there were three or four cars.

Q. Were you able to see from where you were across there before you did start to cross, were you able to see westerly at all, to see what was coming, or whether anything was coming or not?

A. Well, with that execption.

Q. With what execption?

A. The cars on 2.

Q. I am asking you if those cars you speak of obscured your vision so that you could not see; that is what I want to get at.

A. I don't know exactly—

Q. What I mean?

A. I think I know what you mean all right, but I cannot quite express the idea of it.

Q. Can't you tell whether or not you could see westerly what was going on there?

A. I could see up as far west all right.

I did not see these cars come on to these other cars. I looked.

MR. PLUMMER: Q. Tell the Court and jury then why you could not see these cars that afterwards came against the string of cars that were standing still if you looked and didn't see them.

A. The only thing I know would be the obstruction of view caused by those cars.

Sometimes the tracks were crowded with cars and other times there are not very many.

Testimony of HENRY CANTLEY.

Whereupon the following proceedings were had:

MR. PLUMMER: Q. I believe you described there why you people went across this way, the way you did go to the depot, instead of going up around this way; I want you to just describe the reasons for that; you described it on the other trial, but you have not here.

A. The only reason that I said was because there was better walking out there on the main line is all. We just crossed over there for convenience. I testified on the other trial that the cars up there in that part of the yard there where the shops were, were more or less obstructed; that this was the usual way which we went across. That is true.

Whereupon the following proceedings were had:

It was admitted there was no man on top of the cars that struck Mustell before that car struck him, and there was no man on the ground to warn him that the cars were going to move.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

MR. ALBERT: Q. Mr. Cantley, how long had you been working with Mustell?

A. That day, or previous?

Q. Yes, that day or previous?

A. Well, we had been out in the morning, and just previous to the accident we had been out about an hour.

Q. Had you been checking that train that you referred to?

A. Yes sir.

Testimony of HENRY CANTLEY.

Q. That train had come in an hour before?

A. Yes sir.

Q. And had been placed on track five, is that right?

A. Yes sir.

Q. Or part of it, or what, do you know?

A. Well, I think the whole train was on track five.

I would not say for sure.

Q. Placed on five and you and he had been checking that. You had completed your check at the time you came up alongside of track five?

A. Yes sir.

Q. And you started over from track five to the place where the accident happened, practically across the tracks?

A. Yes sir.

Q. In going across those tracks, were you engaged in any work which distracted your attention at the time from what you were going to do?

A. No sir.

Q. Were you engaged in any conversation with him at that time?

Q. No sir.

At the time we reached Track 5 Mr. Mustell was ahead of me, a little to my left. I don't know just how far but he was a little to the left, and as I say he was about five or six feet ahead of me, and when the car struck him it knocked him across the rail on the outside, or what is known as the north side of the track, and I had one foot across and I jumped back.

Thereupon the following proceedings were had:

Testimony of HENRY CANTLEY.

Q. And how close, about, was he to the car?

A. How do you wish me to show it, Mr. Albert?

MR. ALBERT: Any way, by pointing it out here, or giving us distances.

THE COURT: Put it in feet, so that it will be in the record if you can.

Q. About how far was it?

A. Oh, about as far from here over to that banister there.

THE COURT: Indicate it in feet if you can, Mr. Witness.

A. Well, about three or four feet, somewhere along there, I wouldn't be positive.

MR. ALBERT: Q. You think it was as far as from the arm of the chair to the corner there (indicating)?

A. Yes sir.

Q. Have you got a ruler here?

THE COURT: Oh, it can be estimated, about three or four feet—he said three or four feet.

MR. ALBERT: Can I measure this?

MR. PLUMMER: How are you going to get that in the record?

MR. ALBERT: I will ask him to measure that.

MR. PLUMMER: He said three or four feet.

MR. ALBERT: Q. (After measuring distance) The distance between this chair and the corner of the rail is two feet.

MR. PLUMMER: He is only estimating it. It cannot be confined to inches or anything of that kind.

Testimony of HENRY CANTLEY.

MR. ALBERT: Q. Now you spoke of them moving very quickly. I wish you would describe what you mean by that.

A. Well, in kicking as a usual thing, when they kick down—

MR. PLUMMER: We object to what is usual.

MR. ALBERT: That is the only way that the witness can tell.

MR. PLUMMER: No.

THE COURT: Describe this particular movement.

A. Well, when the engine comes into contact with the cars—

MR. PLUMMER: Just a moment. I have not asked you that.

MR. ALBERT: No, you have not asked him. I am asking him. You object.

THE COURT: He can testify in his own way. You may answer.

A. I mean when the engine hit these cars they moved very quickly and just as—well, I could not explain it in any other instance than comparing it with another.

I could hear the crash of these cars up ahead only at the time they struck.

Q. Could you hear the slack being taken up?

A. Well, I never paid any attention to that.

Q. Did you pay any attention to the fact that there was or was not an engine working up above there?

A. Nothing, only as I said before, saw the smoke.

I don't know how far those cars moved after they struck. These yards are practically level from the point where we were crossing west to the depot.

Testimony of HENRY CANTLEY.

Whereupon the following proceedings were had:

Q. And in walking, you could have walked, if you and he wanted to, between tracks one and two, without any difficulty, isn't that a fact?

A. Yes sir.

Q. And you could have gone up to the lead and walked along the lead and walked across right at the depot?

A. Yes sir.

Q. Without crossing anything out there to the main line, isn't that right?

A. Yes sir.

Q. And there was plenty of room between the two tracks, tracks one and two, between any one of those tracks, four and five, or four and three, and so on, for you to have walked up there, if you had wanted to?

A. Yes sir.

Q. Mr Plummer asked you about the usual way in which you crossed there at this particular point. Do you recall any other time that you ever went over at that particular point before?

A. Well, we never paid any particular attention to the particular parts where we are going when we are busy.

Q. You go back and forth across the tracks anywhere you want to, don't you?

A. Yes sir.

Q. And you got up and down in between the tracks, or did at that time, wherever you wanted to?

A. Yes sir.

Testimony of HENRY CANTLEY.

Q. You and Mustell and these other employees—well you and Mustell, that is right, isn't it?

A. Yes sir.

Whereupon the following proceedings were had:

MR. ALBERT: Q. What do you mean by saying you went the usual way across there, Mr. Cantley?

A. Well, just a way to get to the depot, out on the main line and up the main line.

Q. It was just as near, was it not, to have gone up between these tracks and on to the lead and across?

A. Yes sir.

Q. And it was just as good walking, was it not, in there as it was over between the other tracks?

A. The only difference is that the cinders were loose there, and they were packed on the main line.

Q. But it was level, and you could walk right along on them?

A. Yes sir.

Whereupon the witness testified on redirect examination as follows:

MR. PLUMMER: Q. And this distance that you have illustrated here a while ago was given to you upon a suggestion by Mr. Albert, wasn't it?

A. I don't know as it was, no sir.

Q. On the trial of the other case.

A. The only thing, as I said before, I would not swear to the distance, and I won't now.

Q. That is what I say, whether it was one foot or ten feet?

A. No sir.

Q. But that was done, wasn't it, upon a suggestion

Testimony of THOMAS D. FARMER.

of Mr. Albert?

MR. PLUMMER: Q. Irrespective of your judgment as to that distance?

A. Well, the only reason I gave that was because they wanted to know, and I said that I could not give any definite distance.

Q. And you wanted to say something?

A. Well, I had to answer the question some way.

Whereupon, on recross examination, the witness testified as follows:

I testified on the other trial substantially as I did here, that the distance was about so much, between two and three feet and at that time I said the distance was from two feet up, I couldn't tell exactly.

THOMAS D. FARMER, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I reside at Cheney. In the month of September, 1913 I was engaged on the Great Northern, switching in the yards as switchman. I recall the accident to Fred Mustell. I was one of the helpers. There is a foreman, field man and a man that follows the engine. I was the man that followed the engine. The first I seen Mustell was when they brought him up to the depot. I didn't see him hit. There were eight or ten cars that were standing still before they hit him. They were standing on track one. I made a written statement before the other trial. I can not read the statement, it is in Mr. Lavin's handwriting. At that time I figured

Testimony of THOMAS D. FARMER.

there were fifteen. I couldn't say whether it was fifteen, or eight or ten; it was somewhere in there. Our crew coupled into those cars that were standing there. We put some cars in on track one and I suppose the head car struck Mustell. We put some cars on track one that struck the string that struck Mustell. Mr. Steinhouse was foreman of the crew. We were preparing the cars and carrying on the switching under his direction. We put the same amount on there that was already on track one. The whole two strings would be about sixteen or seventeen cars. Speaking of the string that struck Mustell as string No. 1 and the string we put in there as string No. 2, we cut off string No. 2 from the engine. When string two was coupled to the engine I made the coupling to string one and then I cut the cars off. I made a coupling with the two strings of cars and then cut the engine off. After I cut the engine off these two strings of cars went about four or five cars I should judge. The engine was not shunting these cars. It started them and I cut the cars off and they rolled down. The four or five car lengths this double string moved, they moved those on their own momentum by reason of the shove of the engine. That was done under signal and under orders. I could not say where the field man was when this happened. There was no man on the top of string two that we shoved in there. Miller made the coupling and that was all he did. There was no man at the brake on string two. There was no warning given of the movement of these cars, either by the ringing of the engine bell or whistle or anything of that kind that I heard.

Testimony of THOMAS D. FARMER.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

I was not paying any attention to any warning by any bells or whistles. In switching we do not pay attention to whistles or bells. We were down in the yard and we came up out of the yard with a string of cars and pulled up by No. 1 switch and took them in on No. 1. There was a string of cars on track No. 1, coupled into them and cut the cars off and then this string moved on down the track. Taking this map here, we took some cars off of some of the tracks; will say, four, five, six, seven or eight, took these cars up on this lead that leads up towards the depot and pulled them up to clear track No. 1. At that time there was standing on track No. 1 some eight or ten cars. I don't know just how many. We came in and coupled on to that string and kept on shoving down the yards. That was the movement that took place there. I cut the string after we coupled and started to shove down. The engine and string kept on moving right down the track after the coupling was made until the cut. The cut was made after we had moved somewheres around a car length after they were coupled, and the cars kept on shoving down there, altogether about four or five car lengths. Steinhouse was the foreman in charge and he gave the signals. Miller was the field man that did the coupling and uncoupling. He was the one that was farthest from the engine. I followed the engine. The cut was made about four or five cars from the engine. Miller made the coupling.

Testimony of THOMAS D. FARMER.

Whereupon the witness testified on redirect examination as follows:

BY MR. PLUMMER: Q. Mr. Farmer, I will ask you if you did not state to Mr. Lavin and myself in our office—first I will withdraw that. I will ask you if this is your signature.

A. Yes sir.

Q. Just follow this right from there so you will see I am not reading it different from the statement you signed while I ask you a question. I will ask you if you did not state to Mr. Lavin and myself with reference to this switching, as follows; before the first trial of this case, and that you also testified to it at the last trial of this case: "Just before cars taken in by us reached cars standing on track 1 Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car lengths."

A. Yes, I did.

Q. And is that true? A. Yes, sir.

Q. Then the engine did not shove the cars after the collision between the engine—

A. Yes, they did.

Q. Just a moment. Then the engine did not shove the cars after it coupled into them, at all, did it?

A. Yes sir.

Q. Since the last trial of this case, you have been up into Mr. Albert's office on numerous occasions, and he has talked to you about this case, notwithstanding the fact that you were subpoenaed as our witness and was called by us at the former trial, and re-hashed and

Testimony of THOMAS D. FARMER.

and rehearsed your testimony in his office on two or three occasions, haven't you?

A. I have been up in Mr. Albert's office, yes, sir.

Q. And he has been talking to you about your testimony and what you knew about the case?

A. He said very little to me about the case.

Q. I didn't ask you how little or how much; he has been talking to you about it, hasn't he?

A. Yes sir.

Q. And when you made this statement that I have shown you, you had not talked to Mr. Albert or Mr. Ryan, the claim agent at all, had you? A. Yes sir.

Q. Didn't you testify—

A. I talked to Mr. Ryan.

Q. You talked to Mr. Ryan?

A. Yes sir.

Q. But you did not talk to Mr. Albert.

A. No sir, I did not.

Q. Now, since you have talked to Mr. Albert, after making this statement that you cut the cars off and they came in collision with the other cars which caused them to move four or five car lengths—

A. I didn't say it was just before the cars was coupled—

Q. Wait a moment. You now say that you moved into them and moved up about a car length before you cut them off?

A. Yes sir, we moved into them and as soon as I could get over there and cut the cars off I did so.

Q. What do you mean by saying, "Just before cars taken in by us reached cars standing on track 1, Foreman

Testimony of THOMAS D. FARMER.

Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car lengths." Is that true?

A. That is true.

Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance and then cutting off?

A. No sir.

MR. PLUMMER: That is all.

Whereupon the witness on re-cross examination testified as follows:

Defendant's Exhibit 4 is the statement Mr. Plummer was calling to my attention.

Defendant's Exhibit No. 4 offered and received in evidence without objection.

With reference to the statement: "Just before cars taken in by us reached cars standing on Track one, Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back about four or five car lengths" the sequence of how these things happened was when we were backing in, just before we coupled on the other cars, Mr. Steinhouse told me to cut the cars off at a certain place, which I went to do, and before I got to where the coupling was they coupled up and I pulled the pin. That there is where you get "just before" in that statement. It was not meant just before the cars were coupled that I cut them off.

Whereupon the witness on redirect examination testified as follows:

Testimony of THOMAS D. FARMER.

BY MR. PLUMMER:

Q. Why was it necessary for you to go up and see Mr. Albert if you were only to go and tell what the facts were?

A. I went up to Mr. Albert's office, and he told me "All we want is the truth, and nothing but the truth."

Q. And you read over your former testimony in his office didn't you?

A. I read part of it.

Q. Part of it?

A. Yes sir.

Q. What did you do that for?

A. Because I did.

Q. I say, what did you do that for?

A. Because I wanted to.

Q. Why?

A. Because I did, that is all.

Q. That is the only reason you can give?

A. Yes sir.

Q. You talked it over as you read it over with Mr. Albert?

A. No, sir, I was right in the little office.

Q. In his side office there. What do you mean then by this in this statement, "I did so, and cars struck the cars standing on No. 1 bumping them back four or five car lengths," if you say now that the engine shoved them back part of that distance?

A. It did.

Q. Why do you say that the contact bumped them back?

Testimony of C. H. GEPHART.

A. They were coupled up and I cut the cars loose, they went down four or five car lengths.

Q. Of their own momentum?

A. Yes sir.

Q. All right.

MR. ALBERT: Just one question. You have been subpoenaed here by me?

A. Yes sir.

MR. PLUMMER: After we did.

THE WITNESS: Both times.

MR. PLUMMER: That is all, Mr. Farmer.

C. H. GEPHART, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I am general yardmaster of the Great Northern at Hillyard, Washington; have been in that position about four years. The last time I was here before. I have been around the Hillyard yards about ten years.

Q. I will ask you to state whether or not the same customs exist now as had existed during that time in that yard, with reference to switching operations, the movement of cars, and the giving of signals, if any, or the failure to give them, if any, and all things incident thereto if they are the same now that they have been during the ten years that you have been there, or substantially so.

A. Practically the same.

On re-direct examination by Mr. Plummer the witness testified as follows:

Testimony of C. H. GEPHART.

Q. State, Mr. Gephart, about how many are employed in the shops there first, generally?

A. Why, I should judge they would average from two to five hundred.

Q. Two hundred to five hundred?

A. That is the shops and roundhouses.

Q. How many in and about the yards and other shops and places around there?

A. Well, I made that as a bulk.

Q. For the whole thing? A. Yes, sir.

Q. Can you state just the different classes of men in the yards with reference to what they are called, I suppose section men and car cleaners. Just tell what they are you can tell better than I can.

A. Why, there are usually five or six switch engines working in the yard, and a switch engine consists of an engineer, fireman, foreman and two helpers. As I said there is five or six of them. And then there are two shifts of car inspectors and oilers and air men that consists of about six men in a shift, twelve hour shift.

Q. How many shifts are there?

A. Twelve hour shifts, two shifts, and there are car clerks, usually about two days and two nights, that goes out in the yard and call boys around the yard more or less, and general yard master.

Q. What with reference to train crews?

A. I have not got to that yet.

Q. All right, I was trying to get along, that is all.

A. And assistant yard masters, one or two usually, special agent—watchman I should say in place of special agent, and special agent sometimes too, conductors and

Testimony of C. H. GEPHART.

brakemen going to and from their trains, leaving the terminals and arriving at the terminals. I should judge there is about—Oh, possibly eight trains in a day, six to eight trains in a day, and six to eight trains out in twenty-four hours.

THE COURT: I think that gives the jury a sufficient idea.

MR. PLUMMER: I think so. Just one more question.

Q. With reference to the men that are employed in the yard, and also this part of the yard over here where these buildings are shown, the machine shop and so forth, state whether or not practically all of these men here go across the yard live at Hillyard, the town being on the north part of this map, the main part of the town?

A. I can show the Court and jury if I had a ruler there, about where the shop men cross.

Q. I am not asking you for the exact spot where they cross, because they cross at different places, but just show generally where they cross to that side of the yard. I don't care about the particular place that they cross.

A. They cross to the west of the depot as a usual thing, there is a little walk.

Q. Answer my question; do they cross over these tracks, some part of the yard, to get over to Hillyard?

A. They cross some part of the yard, yes sir.

Q. And at the end of the ice house, near this spot where Mustell was killed, state whether or not there

Testimony of C. H. GEPHART.

was an opening from the street into the yards across the north end of that ice house?

MR. ALBERT: That is objected to as immaterial. It has nothing to do with this duty owing to this man.

THE COURT: He may answer yes or no.

A. Yes sir, there is an opening.

On re-cross examination by Mr. Albert he testified as follows:

Q. That opening is blocked by some ties and things thrown in there, isn't it?

A. Yes, sir and sawdust.

Q. At the time of the accident what was the situation there?

A. About the same as it is now. There is a pile of sawdust and ties in there, and walked behind it to get an opening into the street.

Q. Men in the machine shop, and these other shops around here, where do you say they cross with reference to the depot?

A. Here is the depot, right here, and here there is a little crossing, right in here, between these two switches, I think it is.

Q. Two switches just north of the platform east of the store house, is that right?

A. Yes, somewhere in there. There is a little crossing, and these men come around there and go over the depot platform, from this side of the depot or that side of the depot, and some of them cross over here and some of them cross over there.

Q. That is, cross over to the machine shop?

Q. The men who were employed in the yards are

Testimony of D. ELMER MURPHY.

the yard clerks, car checkers and car inspectors and the crews, the switching crews and train crews?

A. Yes sir, and the yardmasters.

Q. In other words, those employed in yard service include the ones that you have just mentioned?

A. Yes sir.

Q. Car repairers work down here on these tracks south of the track scales, as they are now constructed, is that right?

A. The rip track men work in there somewhere.

Q. And the other tracks, one to nine inclusive, are what are called classification tracks, aren't they?

A. One to ten inclusive.

Q. And on those tracks the trains are made and broken up and switched in and around in a series of ways?

A. Yes sir.

Q. Switching is carried on on all those tracks at different times during the year, though?

A. From one to ten inclusive, yes sir.

Q. The full length of the yard?

A. Yes sir.

D. ELMER MURPHY, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I reside in Hillyard. I follow braking part of the time. I worked in Hillyard two nights five years ago. I handled trains in and out of the Hillyard yards for nine months. There was seventeen days during that time I was not working. This was in the year 1909 and 1910.

Testimony of D. ELMER MURPHY.

WHEREUPON the witness was cross examined by Mr. Albert and testified as follows:

I started making trips on the 14th day of August, 1909, and worked until 27th day of January, 1910. I resigned and went back to work on February, 14th and then worked until May 21st, 1910.

On re-direct examination he testified as follows:

Q. As you understand from railroading, the object of having a man on the end of this car is to protect anybody that might be injured by the car moving, isn't that right?

A. Yes sir.

On re-cross examination he testified as follows:

Q. If fifteen or twenty box cars only going sufficiently far to go two or three or four or five car lengths, you would not think it would be necessary to put a man on the end there, would you?

A. No lots of times they do not.

Q. And that is the way it was in the yards while you were working there, wasn't it?

A. Well, I never worked at this job, no.

Q. I mean while you were observing the things going on in the yards? A. I have observed it that way, yes.

Mr Albert: Q. You put a man on top to protect these switches or any movement over the hump, wouldn't you?

A. Well, it is to protect everything according to my idea.

Q. How?

Testimony of D. ELMER MURPHY.

A. It is to protect everything that a man is put on there.

On re-direct examination he testified as follows:

Q. (By Mr. Plummer). If you are bringing in a string of eight cars for the purpose of coupling on to a string of eight or ten more cars, which eight or ten more cars were standing still, and you were bringing these other cars against them for the purpose of placing those four or five car lengths further on, there is no occasion then for uncoupling the engine until you had placed the cars by pushing the cars these four car lengths, is there?

A. No, for one reason it is not, but it is a matter, I have known lots of fellows to do it.

Q. I know, but lots of fellows get killed too. But if they want to place these eight or ten cars four car lengths further on, when the engine has got hold of all of them, if that is the purpose, you keep on shoving—he will keep on shoving, won't he, until he shoves the whole length?

A. Yes sir.

Q. Is there any occasion for a collision between those moving cars and the string of eight or ten cars sufficient to cause those eight or ten cars to move almost instantly, the full string, in order to place the cars down there four car lengths?

MR. ALBERT: That is objected to, no proper foundation laid.

THE COURT: It is not a proper question for expert testimony. It is a question for the jury.

Testimony of D. ELMER MURPHY.

Whereupon the witness, upon re-cross examination, testified as follows:

By MR. ALBERT:

Q. The occasion depends upon what is wanted to be done with the cars, isn't it, and the engine, what other switch movements are going to take place in the yards?

A. I don't get that now.

Q. I say the occasion for shoving these cars in that particular manner would depend upon what else was wanted to be done, or what other switching was wanted to be done in the yards, wouldn't it?

A. Well, I suppose so.

MR. ALBERT: I will put the question again. The occasion for shoving the cars down four or five car lengths would depend upon what they wanted to use the track for, or what they wanted to use the track for, or what other switching they wanted to do in the yard, wouldn't it?

A. I don't know whether they would or not. I don't know what their idea would be.

Q. All right, take a drop switch. You have a drop switch and a flying switch and a kick switch. I think we are all agreed upon what a flying switch is. A flying switch is a switch where the engine goes down one track, either pulling some cars behind it, for instance, from the east end, and they throw the switch after the engine has gotten by it, and some cars go down the next track?

A. Yes, sir.

Testimony of D. ELMER MURPHY.

Q. And the engine stops and allows the cars to go on by, is that right?

A. Yes, sir.

Q. And a kick switch is when you put a string of cars in on a track, and back down, for instance, on the track, and suddenly stop your engine and send the cars on down a considerable distance on down the track, isn't that right?

A. Yes, sir.

Q. And a drop switch consists of—put it this way: as a matter of fact, there is a different understanding as to just exactly what a drop switch is, isn't there, on different roads?

A. Well, according to my opinion a drop switch and a flying switch is both the same thing.

Q. Let me call your attention to this also, that upon some roads a drop switch and a flying switch are the same, and upon others the drop switch is, is it not, where the car that is to be moved is on a higher grade than the engine, and the engine simply leaves that car on the track, and the car goes back down by the engine on account of the gravity?

A. Yes, sir.

Q. You said that lots of fellows do uncouple engines when they make shoves down there such as you have described, is that right?

A. Yes, sir.

Q. And that was what you observed during your period of acquaintanceship with these yards over there in Hillyard, is that right?

A. No, not in Hillyard altogether.

Testimony of D. ELMER MURPHY.

Q. I mean you have observed that in the Hillyard yards while you were over there working there on the road or in the switching capacity?

A. Yes, I guess I have.

Whereupon the witness on redirect examination by Mr. Plummer, testified as follows:

Q. With reference to a string of cars that is standing still in the yards, how are those cars, before any of the cars are coupled to them, and assuming these cars had been there for some little time, what is done to those cars to hold them there, so that they won't roll or move?

A. Well, there is generally always brakes tied on them.

Q. That is what they call tied down, isn't it?

A. Yes, sir.

Q. And if it is intended to move those cars at all the brakes are thrown off, aren't they?

A. Yes, sir.

Q. Before they are moved?

A. Yes, sir.

Q. Well, if it was intended to shove these cars further on to some other point, state whether or not they would crush other cars into them, as was done in this case, so as to move the whole string instantly, without taking the brakes off, if they are tied down?

MR. ALBERT: I object to that as improper, incompetent, no proper foundation laid and an issue for the jury, if it is an issue for anybody.

THE COURT: He may answer. I want to get through with this witness some time, though. Answer the question.

Testimony of THOMAS KNEELAND.

A. Yes, sir, I have seen it done, brake the cars to slow down the others, and not allow them to run too far. Probably they wanted to take them to be repaired. I have seen it done where they would put the cars up and not probably want the rest of them to run away, hold them up close to the yard.

Whereupon the witness upon re-cross examination testified as follows.

They do not tie down cars so they are immovable altogether. As a matter of fact they tie cars down with hand brakes on purpose to move them, by throwing cars in against them, and to hold them and not let them get too far. Probably they would naturally move a little. It is the purpose and intention when cars are tied down that sometimes in connection with throwing cars in against them or shoving cars in against them, they intend that those cars shall move when the cars hit them and make more room for cars on the other end of the switch track if they hit them hard enough. I have seen that done in the yards.

THOMAS KNEELAND, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I have had about fifteen years experience as a switchman and brakeman on the Omaha, Northern Pacific and S. P. & S. The last place I worked was Vancouver, Washington. I was just a helper in switching.

Q. If there is a string of eight cars standing on a track in a yard and you want to move these cars up a

Testimony of THOMAS KNEELAND.

distance for piling for instance, is there any necessity for making—for doing that by a kick switch?

A. Why no, if they were kicked in there there would be a man on them to see that they coupled, that a coupling was made. The proper way to do would be to place this engine and let him kick the head to see whether the cars were coupled up or not, because they are liable to run out the other end, if it is a yard where there is a hill at both ends.

Q. If the engine is coupled onto the end of the cars?

A. You ought to have a man on the hind end to see whether there is a brake step on there or not.

Q. They could be shoved in a distance of four car lengths and placed without doing any kicking?

A. Yes, if there is room enough.

On re-cross examination by Mr. Albert he testified as follows:

I just came back from work on a ranch at Green Bluffs. I am not employed at present.

Whereupon the following proceedings were had:

In connection with the cross examination of Thomas Steinhouse, a witness called on behalf of the plaintiff, the following rule was offered by Mr. Albert on behalf of the defendant and admitted.

Rule 102: "When cars are being pushed by an engine (except when shifting and making up trains in the yards), a brakeman must take a conspicuous position on the front end of the leading car and signal the engineer in case of danger."

Testimony of M. T. O'BRIEN.

M. T. O'BRIEN, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

I reside at Yardley. I have had 16 years' experience as a railroad man. I worked for the Great Northern. I left the service August 3rd, 1910. I was discharged.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

They frequently, in switching cars in the yards there throw cars down on several tracks, not at once exactly. Their momentum was stopped to a certain extent. If they were not going very fast they would stop themselves. They would not go over a couple of car lengths after they were cut off something like that. I have never seen them go over four or five car lengths unless they would keep on going, unless there was a man on top. They frequently threw cars down these different tracks while I was there. Usually had a man on part of the time, long enough to set the brake. A man would have the brakes set on them and they would probably go thirty or forty feet. That has happened frequently while I was in the yards. I have testified before in this case against the Great Northern. I was discharged on August 3rd, 1910, for my responsibility in a head-on collision.

Whereupon the witness on re-direct examination testified as follows:

In coupling a string of cars into another string of eight or ten cars, in order to make that coupling it is not necessary to move any of the standing cars at all.

Testimony of M. E. SNYDER.

Whereupon the witness, on re-cross examination, testified as follows:

By MR. ALBERT:

Q. Suppose you were going to do something besides coupling on to them, would it be necessary to use some force to take them down the yards a ways?

A. It all depends; if there was about one hundred cars you would have to use a good deal of force.

Q. If you had to send them four or five car lengths you would have to put on enough power with the engine to get them down that far, wouldn't you?

A. You could start them easy, you know.

Q. You have to send them four or five car lengths, if it is necessary to do that, if that is what you intend to do, you have to use enough power to do it, don't you?

A. You kick them after you couple into them, you see.

Q. You kick them after you couple into them, and send them four or five cars; is that the way you do it?

A. Yes.

Whereupon the following proceedings were had:

It was agreed between the attorneys for the respective parties that Mr. Mustell was night yard clerk in September, 1909 and he was night yard clerk from that time on until October 1st, 1910 when he became day yard clerk. He became in January, 1911, weight master and shortly after that he became manifest clerk and car checker, and continued in that employment until the time of his death.

M. E. Snyder, a witness produced on behalf of the plaintiff, being first duly sworn, on examination testified as follows:

Testimony of M. E. SNYDER.

I have been in the employ of the Great Northern Railway Company as engineer. I have worked on the road and around the Hillyard yard. It has been two years and a little over five months since I have worked in the Hillyard yards. I left the service on April 2nd, 1912. In coupling into a string of cars standing on a track, a string of eight or ten cars, and you want to *couple* into those cars for any purpose, it is not necessary to move any of those cars that are standing still.

MR. PLUMMER: Q. And in case they are moved after they are coupled into, state how the movement is carried on, whether violently or whether easily?

MR. ALBERT: I object to that as a general conclusion; it is invading the province of the jury.

THE COURT: Sustained.

Whereupon the witness was cross examined by Mr. Albert and testified as follows:

It is not necessary to move them provided the engineer gets the proper signals.

Q. I say, there were times when you wanted to get cars down the tracks some distance, you not only wanted to couple on to them but you wanted to move them?

A. Yes, of course there was.

Q. When you wanted to move them you would not just couple into them but you would keep them going?

A. It is customery there to couple on and shove them down, the man on the rear end riding the car that goes down.

They did at times shove them down two or three or four car lengths without putting a man on the end of the car.

Testimony of M. E. SNYDER.

Q. Well, it frequently happened that they did not have men on the cars if they were not going down over the hump?

A. That depends what kind of start they gave the car. If they just slacked the car back or gave it a little bump back, sometimes it was not necessary.

Q. How far would they start and send it?

A. Well, it depends on the track; if you would be going down hill, the car would never stop.

Q. Or on the other side?

A. Well, if the car happened to be on the level or in a sag—a place where the track sagged, she would probably stop. The foreman would have to use his judgment about cutting his cars off on that kind of ground. It is all according to the foreman, who cuts the cars off of the string, and who has got hold of the engine.

Q. He has to use his own judgment where he cuts them off?

A. He is not supposed to cut them off any faster than the field man can ride them in.

Q. But if they were going only three or four car lengths, they would not ride them in, if they were not going over the hump?

A. Well, if he can see where it is going, it is up to the foreman to see where his cars are going, and he is responsible if he cuts off cars and sends them where he cannot control them.

I had a law suit against the Company, which is still pending. I testified in the other trial of this case against the Company.

Testimony of E. G. MILLER.

Whereupon the plaintiff rested and the following proceedings were had:

Defendant moved the Court for a non-suit on the same grounds as hereinafter set forth in the defendant's motion, to direct a verdict at the close of the case, which motion was denied and excepted to by the defendant.

Whereupon counsel for defendant made the opening statement of the defendant to the jury, and introduced the following testimony:

Defendant's Evidence

E. G. Miller, a witness produced by the defendant, being first duly sworn, testified as follows:

I have ben switching for 14 months in Hillyard. I was in the crew at the time of the accident. I was field man. Mr. Steinhouse was the foreman and Mr. Farmer was the engine follower. There were about eight or ten cars on track one and we went down the lead. I can not say exactly which track it is., and we got a bunch or probably seven or eight or nine or more cars and came up from No. 1 switch, stopped and reversed the engine and backed in on No. 1. I was fixing the coupling on the end of the car that was attached to the engine and as we made the coupling I gave the cut signal and we shoved them on and cut them off. The cut was made probably a car or a car and a half after I had made the coupling. The cars kept on going. First, before we made the coupling, we rolled down against them, the pin did not drop and I dropped my arm. The engin-

Testimony of E. G. MILLER.

eer stopped and I signaled him on back and we made the coupling. We came down against this cut of cars standing on No. 1 and we didn't hit them hard enough to drop the pin down, and I seen the coupling did not make and dropped my arm and the engineer stopped. The two cuts lacked possibly two feet, so we didn't make the coupling by two feet. Then I gave him the signal and he came on back against us. With reference to the slack in the cars, we know what slack is from the springs, that is, in the draw bars. Of course, if he squeezes up a bunch of cars and then releases them, there is bound to be some slack run from them. The cars didn't couple up the first time and the slack ran out. When the slack ran out the cars were about two or two and a half feet apart. Then I signaled them on back down and they came right on through. The train was altogether after they were coupled up and it moved probably a car or a car and a half; I couldn't say exactly, something like that. The string of cars was moving eastward on down One. I was walking on the ground just a common ordinary walk. The string was rolling on opposite me and not going any faster than I was. I didn't know Mustell was around at the time. I didn't see him fall. We were not going on through the yards with that string of cars. We were going to shove them back three or four car lengths for a little room, for two or three more cars. The aim was to put in some more on top of them.

I had been employed about three or four months before in the yards. We made similar movements to that every day. I couldn't recall how many; according to how

Testimony of E. G. MILLER.

many trains was in, how many cars you have to handle. That is a very similar movement to doing switching. These yards are used for the making up and breaking up of trains and are known as classification yards. The hump is in the center of the yards near the word "yard." The rest of the yards is level. East of that it slants to the east.

I have known Mustell and see him around there in the yards while these movements were going on. The movement that took place there was a shove. A shove switch is a switch that you go down against a bunch of cars and have them all coupled together and shove them down the track, and cut off when you go to leave them. The engines are all headed west in the yards, so the engineer can get the signals always on the same side, the north side.

Whereupon the witness was cross examined by Mr. Plummer and testified as follows:

There is a difference between a shove and a kick. A kick is where you start the cars by the engine and let the cars go. That is not what we did here. To a certain extent we shoved the cars. The cars probably rolled two or three car lengths after we cut off from them, as a result from the shove of the engine. Cars that are started by the engine and let go is a kick. I don't recall the particultr train that was being switched when I saw Mustell in the yard. In carrying on our switching operations we didn't pay any particular attention to Mustell or the car repairer or any other fellow working around the yard to see where he was. I couldn't say how far it was from this lead on No. 1 down to where

Testimony of E. G. MILLER.

Mustell wts hurt, probably seventeen or eighteen or twenty cars. When the engine was cut off it was standing probably a car east of No. 1 switch. It is not a fact that we took this string of cars with that engine and cut the cars off and allowed them to go into this other string of cars that was standing still. We were intending to place these cars where they were afterwards placed. I didn't say we kicked them in there. We shoved them in there. We let them roll in order to save a little time. There was no particular use running in there and leading them around. When the engine bunted into these cars it didn't hit hard enough to make the pin drop. It didn't move the whole string of cars and kill Mustell. I didn't say I saw Mustell at all. I can't say it moved the whole string suddenly; I don't know. I say the pin did not drop, and the engine stopped, and I signaled him back and made the coupling. The first time it never moved the string of cars. It might have moved the first car an inch or two.

Q. And then you say the engine backed up? Yes, sir.

Q. How far? A. I could not say.

Q. Well, about how far? A. Probably two or three cars.

Q. It backed up two or three cars? A. Yes sir.

Q. And then came against the bunch of cars again?

A. It could not back up, the cars was only apart about two or three feet, and it only had two or three feet to back up until we had been into them again.

Q. What I want to get at is how far this string of cars that the engine had hold of pulled away from the

Testimony of E. G. MILLER.

string that was standing still, after you first tried to make the coupling on it, and it didn't make?

A. About two feet and a half or three feet. This string of cars the engine had hold of pulled away from the string of cars that was standing still after we first tried to make the coupling on it, about two feet and a half or three feet. The string of cars hooked to the engine came back against the string on No. 1 a second time. It hit hard enough to make,—I couldn't say it hit hard enough to move that string of cars forward quickly that was standing still. I don't know. I was right there but I wasn't at the end. I don't know whether they moved or not. The string of cars we came against were tied down.

Q. You said you wanted to move them forward. Don't you usually take the brakes off when you want to move them forward?

A. Well, hardly.

Q. You leave them tied down? A. Yes sir.

Q. The engine comes against them with sufficient force, regardless of the brakes, to move them forward suddenly?

A. No sir.

Whereupon on re-direct examination he testified as follows:

I couldn't say whether the end car moved suddenly or not. That is the question he asked me, if they moved suddenly. I could not say, I was not down there. I made the coupling and that was all the farther down the string I was. In shoving cars in there that the brakes are tied on to we didn't take the brakes off, if

Testimony of H. E. CHRISTOPHER.

we wanted to shove them on a ways. A kick is when we get up on what is called the switching lead and the pocket leads alongside the main line. We start to give the cars a start and stop, just like you would slip them two or three at a time down the lead and turn them in on different tracks. That is kicking cars. When we shove we couple into them and shove them back. We turn them loose and let them roll a little ways. We don't particularly stop them unless there is an awful string of them. At no time did we pay any particular attention to Mr. Mustell or the car repairers around there where we were switching in the yard.

Whereupon, upon re-cross examination, he testified as follows:

It was 1025 feet from the lead to the point where Mustell was killed. It shows on the map. The cars are forty feet long. I can't say for sure how many there were in this double string, probably fifteen or eighteen or twenty. You have to shove about two or three or four car lengths on on One to clear that lead. That lead is catorcornered across the yards there.

Whereupon, on re-direct examination, he testified as follows:

I do not know exactly how many cars they were going to put in there.

H. E. Christopher, a witness produced on behalf of the defendant, being first duly sworn, on examination testified as follows:

I have been a locomotive fireman on the Great Northern for two years on the 4th of September. In September, 1913, I was engaged in switching in the west end

Testimony of H. E. CHRISTOPHER.

of the Hillyard yard. That was the time Mustell was killed. We were putting some cars in on No. 1, how many I don't know, and had left them there and gone back to another part of the yard and got some more and had shoved them in also. I didn't see the accident. I was on the other side of the engine. The first thing I knew of the accident was when the engineer called me over to his side and told me we had run over somebody or hit somebody, or words to that effect. Just previous to that I had been down on the deck putting in the fire. I was down there at the time. I know Mustell by sight and by name, had seen him in and around the yards checking. He was weigh master and he posed as weighmaster a great deal. He used to weigh cars a good many of them. As weighmaster it was his duty to go down there at the scale when we weighed cars. We would shove a car on the scale and cut off and he would weigh the car and we would kick it off. and he would weigh the next one that came on and so on. I never saw a man on the end of the car that was kicked off. I have seen him weighing a good many times. That was on Track No. 1. In kicking those cars against each other they didn't have a man on the end of either of the cars, either of the string of cars, the far end that was being kicked into, or the car that was being kicked against that train. He has often ridden in the engine with us from one end of the yard to the other and things like that under my personal observation.

Whereupon the following proceedings were had:

MR. ALBERT: There is one phase of this case that I don't know whether there is going to be any claim on

Testimony of H. E. CHRISTOPHER.

or not; I did not notice any evidence introduced in plaintiff's case with respect to it, and that is with reference to the question of bell or whistle signals. Do you make any claim on that, Mr. Plummer?

MR. PLUMMER; Certainly. We claim you ought to have a rule for some manner of warning, and you didn't have any.

MR. ALBERT: There is no claim that there was any custom in the yards as to bells and whistles?

MR. PLUMMER: I don't know anything about that, whether there is or not. We have not offered any proof to show any custom as to bells and whistles. I will say that the only thing we will claim with reference to bells and whistles is that if they had been given, it would have tended at least to warn plaintiff of the imminence of his danger. We have not offered any proof to show that it was customary to ring a bell or that it was not, but we do insist that that is one of the ways that a rule could have been prepared to give warning.

Whereupon the examination of the witness was continued and he testified as follows:

At the time or just before this movement I was putting on fire when he hit the cars. I knew when he hit the cars but I didn't notice anything more. There was no effect on my movement on the gangway that I noticed. I was not knocked around or anything of that sort. I have heard the movement described that happened at the time Mustell got hurt. I have heard the testimony of Mr. Cantley and Mr. Farmer and other witnesses who testified directly to it. That movement and similar movements had happened in the yard before that time,

Testimony of WALTER LAW.

it was a very frequent occurrence. It comes under the head of every day switching. It has been going on during the two years I have been in the service.

Whereupon witness was cross examined by Mr. Plummer and testified as follows:

I am in the service now as locomotive fireman and hold the same position I did then, firing on a switch engine, I have seen Mustell and what he was doing and noticed his work around there for the two years I have been there.

Walter Law, a witness produced on behalf of the defendant, being first duly sworn, on examination testified as follows:

I was watchman at the Hillyard yards in 1913. Just previous to the accident I was going east from the depot and I went down between three and four. I saw him just before he got hurt. He and Cantley were coming back as I was going down. It was a little east of the accident and on No. 5 track, I think it was. I did not see the actual occurrence. They were coming back in kind of a hurry, walking side by side. When I heard him call out I turned around. He was lying on the ground on the north side of the No. 1 track just outside of the rail. When I first looked around the car wheels were just passing him, the first pair of trucks. I found him lying right there in the same position. About four cars had gone by.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

He could get around pretty good. He was a pretty active man.

Testimony of THOMAS STEINHOUSE.

Thomas Steinhouse, recalled on behalf of the defendant, testified as follows:

I have been switchman and switch foreman in the yard service for nearly five years. When the cars come in they are set on certain tracks. The car men examine the train first. In the meantime the car checker gets a list. He goes down and marks the train. He marks the destination of each of the cars and marks them with chalk. After he gets through with them the field man lets the air out of the brakes. The foreman goes down and makes a cut wherever he thinks he has got enough cars to handle with safety and handily. He then pulls it over the switches on the lead and examines the cars and the marks while he is pulling them up or before he pulls up, and when he gets over the switch he designates which switch he wants thrown, by signs one, two, three or four or whatever it is. He puts his hand out with so many fingers raised, agreeing with the number of the switch. After he shows what track the cars go down the foreman cuts off the car designated for that track. The field man throws the switch. The ones that are cut off are generally kicked in on that track. If the cars have gained speed enough or are given speed enough to send them over too far, the field man is supposed to protect them by setting brakes. If the impetus was not enough to send them over the hump the cars would stop of their own accord when the momentum dies out. If they intended to throw cars against those cars the field man would naturally set one or two or three brakes. If there is no intention to throw other cars against them

Testimony of THOMAS STEINHOUSE.

the cars west of the hump would be allowed to stand there until they required to use them. There were four switch engines working directly in the Hillyard yard at that time.

I was the switch foreman in charge of this particular movement. We had put ten cars in on No. 1 track, and the field man, Mr. Miller, set three brakes, enough to hold the cars in far enough so we could project some more against them. We went back and got some more and pulled up and started to back in on one, and field man Miller was on the ground to make the coupling. We shoved against those cars that were in there and they didn't couple the first impact and we still kept going back to make the coupling. When the coupling was made I gave a sign for the engineer to push the cars and at the same time gave a sign to the field man to make the cut. The cut was made immediately after the coupling was made. Immediately I gave the sign to push the cars, at the same time giving the sign for the man following me to cut the cars off, and just at that instant I saw this man Mustell fall. The cars had already got started at that time and I immediately gave the sign to the engineer to stop and he stopped. I had no knowledge that Mustell was at the end of these cars.

Q. I will ask you whether or not that movement, as far as shoving the cars in and coupling them and cutting them off is concerned—practically the whole movement up to the time you have the stop signal on account of this accident to Mustell, was an unusual movement in the yards or not.

A. No sir; that is practically routine.

Testimony of THOMAS STEINHOUSE.

Q. Had that been done at any time before that?

A. Yes.

Q. How often?

A. Oh, I could not give the exact number of times; it is continually done all day long.

It was not customary to send a man down to the far end of the string of cars after the coupling was made for the movement that we were going to make at that time.

The purpose of the movement we were making in there was to make room for some other cars on No. 1 track. We expected to get those cars off the train that we had made the previous cut off. My idea was to get the cars for a designated point on one track, and after getting them on that track to push them in far enough to clear the lead so we could have a view of the other tracks. In order to clear the lead it would have to be at least three car lengths from the point of the switch, I did not know how many cars we were going to put in there. If the movement was not to go over the hump, the practice was to put one or two or three brakes on, sufficient to hold the cars while we projected others against them, to insure coupling. If we were not going to throw any more cars in there we would leave them standing. Three brakes would hold them on the level.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

This was a usual movement that was carried on this day, both as to extent and force of the movement, no difference in either, not a bit. Just at the time the coupling was made on this standing string of cars I gave

Testimony of HENRY CANTLEY.

the engineer the sign to back up. I gave him a sign. The cut was made immediately after the coupling was made. I gave him a sign to cut off and a sign to shove at the same time. The engine was cut off immediately after the coupling was made and the cars continued on and the engine surely shoved that string of cars. The engine was the cause of the cars moving. The cars were tied down because they were approaching the top of the incline.

Henry Cantley, recalled as a witness on behalf of the defendant, testified as follows:

I will be 20 years old next month. I started to work for the Company April 28, 1909, at the Hillyard store. There were no cars that I noticed between that end of the string that hit Mustell and the switch down at the east end. Mustell that day had been instructing me about the manner of checking cars and about things in general. He had been with me a couple of days instructing me. He said for me to be careful. I had a habit of climbing around on the cars, I was new at the work, and he told me to be careful about it, that they were liable to switch there most any time and kick a bunch of cars in there and I would get hurt at it. That was that day. The accident occurred shortly after noon.

Whereupon the following proceedings were had:

It was agreed between counsel that the accident occurred about two o'clock.

Whereupon the examination of the witness was continued, and he testified as follows:

I had observed switching before around in those yards in a general way.

Testimony of HENRY CANTLEY.

Q. I will ask you whether or not there was any difference in the movement of that car at that time than other movements in the yards previous to that.

A. Not that I know of, in particular.

During the period I was with Mustell switch engines were moving around all over the yards without notice or warning to him.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

Q. Now, Mr. Cantley, you say sometimes you saw men on the end of the cars when they were being shoved down?

A. Yes, sir.

Q. And when they were being kicked down?

A. I don't know—

Q. You don't know what the movements were?

A. No, I don't.

Q. What kind of business were you in before you went with Mustell to learn the car-checking business?

A. I was material clerk in the store department.

Q. And you had no knowledge about anything about the yards, had you?

A. No, sir.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

Q. When you climbed up on the cars Mustell told you you must not do it because they were liable to switch those cars and you were liable to get hurt?

A. Yes, sir.

Q. On this particular occasion, you being right behind Mustell as you have heretofore described and a

Testimony of HENRY CANTLEY.

considerable distance from where he was, you just barely had time to get out of the way so the car would not hit you, didn't you?

A. Yes, sir.

Q. On account of the quickness with which it moved?

A. Yes, sir.

Q. You didn't see anything to indicate that any car was coming against that string of cars, did you?

A. No, sir.

I just glanced up in a casual manner and saw the way the smoke was going straight up. I didn't have the purpose in mind of seeing if there was any danger. As I said before you can't tell when the cars are going to move.

Q. As a matter of fact, when you didn't see anybody on top of that car and did not see any man on the ground and did not see any indication of any cars coming you thought you were perfectly safe in crossing there at that time.

A. Not any more than—

Q. (Interrupting) Well, you thought you were perfectly safe.

A. We certainly would not have tried to cross if we thought there was danger there.

Whereupon, upon redirect examination, he testified as follows:

Q. You started to say "Not any more than—"

A. Not any more than going around any other car.

Q. With reference to kicking this car down there, Mr. Cantley, you said it kicked very quickly. Now I

Testimony of THOMAS D. FARMER.

want to ask you how that compared with the kicking of other cars that you had observed in the yards there.

A. Well, as a general observation, I did not see anything different.

Whereupon, upon re-cross examination, he testified as follows:

Q. You do not know how far it went through, do you?

A. No, sir.

Thomas D. Farmer, recalled as a witness on behalf of the defendant upon examination by Mr. Albert testified as follows:

The switch we were making at the time of the accident was a shove. The first I knew of the accident after I cut the cars off, I looked up and saw Mr. Mustell lying on the ground.

Q. Was there any sudden jerk or smash of the engine there?

A. Not that I know of.

Q. How did cars move in the yards there during your experience while you were a switchman there, with reference to giving warnings or notice that movements were about to take place, any movements similar to this?

A. Well, there was no warning that I know of, only—there was no warning from the men, the men that was working around the cars had to look out for themselves.

MR. PLUMMER: That last part I move to strike out, if your honor pleases. He asked him with reference

Testimony of A. THOMAS.

to warnings and then he said that they had to look out for themselves. That is not responsive.

THE COURT: That is a conclusion, I think.

Q. With reference to the men who were working on the switching tracks, outside of the repair tracks, was it customary or usual, in movements similar to this, to give warnings to them?

A. No sir.

Whereupon, upon cross examination by Mr. Plummer he testified as follows:

Q. You made a statement also to the claim agent right after this thing happened, didn't you?

Q. And you testified when this case was partly tried in the superior court, didn't you?

A. Yes, sir.

Q. And during the trial of that case, although you were subpoenaed as a witness by us, and were over there to testify on behalf of the plaintiff, after giving us this written statement, you were in constant communication with Mr. Albert and Mr. Ryan of the railroad company, weren't you?

A. I was, yes, sir; I was subpoenaed by them.

Q. How is that?

A. I was subpoenaed by Mr. Albert.

Q. After I subpoenaed you?

A. Well, I don't know whether it was after or—yes, it was after you subpoenaed me.

A. Thomas a witness produced on behalf of the defendant, being first duly sworn, was examined by Mr. Albert and testified as follows:

Testimony of A. THOMAS.

I am a car repairer, I have been with the Company about 16 years. I remember the accident that happened to Mr. Mustell. I was in the yard that day inspecting on track 5. Mr. Mustell was in the yards every day at most all hours, different times. Whenever a train came in he was in the yards checking up, marking cars. I saw Mr. Mustell just before the car struck him. I did not see the car hit him but he was very close to the car the last I see of him. He was coming up through the yard and went to cross over from track five, over towards the main line. He and Mr. Cantley came up through the yards, apparently not paying a great deal of attention to where they were going or anything. Mustell was just walking across the yards. I saw him just about the time he got to the track these cars were standing on. He started to cross. I couldn't say whether he looked up or looked around. I did not see him look up. The cars were moved but I didn't notice just how hard or how fast they were moving; that is, they were kicked in.

Q. What I mean is whether or not you observed this movement so you could tell whether it was similar or different from movements that had occurred in the yards at other times prior to that?

A. Nothing more than the movements as made daily there. I could not see any difference.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

Q. That was a similar kind of a kick movement you had seen made before, was it?

A. The same movement.

Testimony of W. F. KIPPLE.

I don't know whether it would be a kick or a shove. I don't know which it was, the cars were moving. I would not term it a kick switch. I saw Mustell when I was over on five. I was right in there somewheres, pretty near straight across from where the accident occurred.

Whereupon the following proceedings were had:

The point where he was standing was marked X.

Whereupon the examination of the witness was continued and he testified as follows:

I was inspecting a train that just came in. I inspected the train by looking it over and if I find a car in bad order you put a bad order tag on it and set it out and it is kicked over or shoved over to the rip track to be repaired. I was doing that at the time. I was looking at the equipment, the wheels and gear. I was on the north side of the track, the west side we call it there, on the side towards Hillyard. You have to look south in order to examine the equipment. I seen someone with Mr. Mustell, and I looked across to see who it was. I didn't know it was Mr. Cantley, at the time.

Q. Didn't make any note of how far he was from the car, or anything about it did you.

A. Well, he was crossing—Well, I started to say that he was starting, started to cross pretty close to the car. When we are working in the yards and see anyone close to the cars we generally notice it.

W. F. Kipple, a witness produced on behalf of the defendant, being first duly sworn, testified as follows, upon examination by Mr. Albert:

Testimony of LESLIE ANDERSON.

I am a switchman, at Vancouver. I was car checker at Hillyard. I broke Mr. Mustell in as car checker and I instructed him in the duties of that position such as checking cars, marking cars, getting seals, mark trains, mark the location of tracks, line trains. I have told him all about different dangers such as approaching trains, switch engines, crossing over tracks or under cars or through cars and things of that kind. I told him to go down by the lead and then cross over because he would not make any time and that has always been my experience as long as I was there. I told him about movements on the the tracks; you always expect switch engines working at both ends, you could always expect trains moving at any moment and always keep clear of them.

Whereupon, upon cross examination, he testified as follows:

I have been brought over from Vancouver to testify in this case. There was no one else present when I told Mr. Mustell of these dangers about moving cars, and he is dead.

Leslie Anderson, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

I am 21 years old. I am yardmaster's clerk at Hillyard. I have been in the service 7 years. I have worked from call boy up, yard clerk, car checker and manifest clerk, weigh master, both day and nights and yard master's clerk. I did not see the accident. I have heard the testimony relating to the movement of the trains and so forth. I was with Mustell several times prior to

Testimony of LESLIE ANDERSON.

the accident, when movements similar to this occurred, similar to the movement which occurred just previous to the time of his death. It occurred frequently in the yards.

Q. Did they move them without them, without those signals or warnings or bells?

A. Well, in some cases, yes. Take it around the noon hour, and any time when the men are going to and from the shops, the bell is always rung, when there is men crossing on the track.

Q. That is at what point.

A. Right there in front of the yard offices, in front of the depot, a little ways, there is a crossing where most of the men cross.

Q. That is up at the extreme west of the map there?

A. Yes, sir.

Q. What about down in the vicinity of this accident?

A. Well, they never ring the bell down there. There is hardly any men crossing there, that is down in the yard there.

On cross examination by Mr. Plummer he testified as follows:

Q. Don't you know, sir, that men from these shops and these different buildings there, that are working there during the noon hour, when going to their meals, when switching is going on, that they cross down by that place, by the ice house, over to Hillyard, and through this opening here and these other openings, and all through the yard?

A. Not very many of them do.

Q. Well some of them do?

Testimony of LESLIE ANDERSON.

A. Not very many.

Q. Well some of them do?

A. One or two.

Q. You have stood there and counted them each time?

A. I have been down there several times, yes sir.

Q. And every time they go to or from their lunch, or home at night, or to work in the morning, you say that only one or two pass there?

A. Not any more than that.

Q. And there are none pass through here (indicating).

A. No sir, there is a hard place to get through there.

Q. How many pass through here? A. None.

Q. And how many pass through here (indicating).

A. A few.

Q. As a matter of fact, they pass all around there and you did not pay any attention to it?

A. Yes sir, I paid attention to it all the time.

Q. Why did you pay attention to it?

A. Simply because I did.

MR. ALBERT: I object to that; that is not within the issues.

MR. PLUMMER: See what he knows about this.

Q. Why did you pay attention to it?

A. Well, I didn't have much of anything else to do, and simply noticed it. I have been out there many times.

Q. But you are yardmaster's clerk, are you?

A. Yes, sir.

Testimony of WILLIAM BOND.

Q. Don't you have anything to do?

A. Yes sir, duties in the office and out in the yard both.

Q. And during these different times, during the noon hour, and the night hour, and the morning hour, you have noticed just how many men go around different places to get to Hillyard?

A. I have at different times, yes, sir.

I didn't see the movement that killed Mustell. I know how that movement was made from the testimony. I was on the ground a minute and a half or so after it happened.

William Bond, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

I am assistant yardmaster in Spokane at the present time. At the time of the accident I was Assistant Yardmaster in Hillyard. I have had 20 years' experience in switching, on the S. F. & N., the Great Northern, the Northern Pacific and the O. W. R. & N. I am acquainted with the methods of switching on all these roads. The day of the accident I was standing on the platform right at the depot. I saw the switching movement that occurred there. They had a bunch of cars on One and pulled up with another bunch over the switch, and shoved down and coupled on and started them back and cut them off. I saw the speed with which that movement was made. It was not very fast; just enough to move the cars a little bit. It don't take much to move them three or four car lengths there, it is level. I have had an acquaintance with the movements in the Hillyard yards ever since 1902. That

Testimony of WILLIAM BOND.

movement is a movement that is liable to happen on any track there any day and it is happening every day. It happened pretty close to two o'clock. It was day light. The cars that were standing there were empty. They were on track One and they were switching a train and getting the city loads out to Spokane.

Whereupon the following proceedings were had:

MR. PLUMMER: We admit Mustell's familiarity with movements of trains in the yard there, because we have said he knew the custom and relied on it. He knew the custom as it actually existed.

Whereupon the examination of the witness was continued:

Q. I will ask you with reference to the frequency during this time, previous to his death, of cars moving backward and forward there, without any warning of any kind?

A. It happens all the time, every day.

Q. Supposing in these yards, Mr. Bond, it would be necessary to put a man on each and every one of these cars that were moved in there, what would be the result of that business?

MR. PLUMMER: Just a moment, if your honor please. There is no claim here that it was necessary to put a man on each one of those strings of cars, or each car by itself.

THE COURT: There is nothing involved here except the mere question of custom, they say.

MR. ALBERT: All right, as long as we know that, I will be glad to cut it out, on that understanding.

Testimony of WILLIAM BOND.

MR. PLUMMER: Sure.

Thereupon the examination of the witness was continued:

I don't know just exactly when they set that first string in there. It was a short time before they made the second cut.

C. H. Gebhart, a witness produced on behalf of the defendant, was recalled, and on examination by Mr. Albert testified as follows:

I am General Yardmaster. I have been employed in connection with switching for more than 30 years. I switched in the terminals in Duluth, the Northern Pacific and the old St. Paul and Duluth. I came to the Great Northern at Larimore, North Dakota, in 1903, and have been with the Company ever since. The first time I came to Hillyard was about 10 years ago. I have been in the Hillyard yards this last time about 4 years. I did not see the accident but I did shortly after it happened. I saw the man when he fell. I was standing on the platform of the depot. I saw this train come in there. I saw the movement that occurred there.

Whereupon the following proceedings were had:

Q. What did they do?

A. There was a bunch of cars on No. 1. track.

THE COURT: To a very considerable extent there is no dispute whatever between the parties as to what happened.

MR. ALBERT: There seems to be a dispute. If they do not dispute our witnesses I certainly do not care to put on any more witnesses.

Testimony of C. H. GEBHART.

THE COURT: Every witness testified that there were eight or ten cars on there, and put some cars on after that.

MR. PLUMMER: There is no dispute about that at all and never has been.

MR. ALBERT: No dispute about that, but what happened after they went to couple up.

There was a bunch of cars in on No. 1. track and they pulled a bunch of cars off the train they were switching from to the other tracks, pulled up over No. 1 switch and back in against these cars that were on No. 1. track and there was a man down there giving them signals, giving them hand signals. When they coupled together I was talking, or Mr. Bond, rather, started to talk to me. He was standing right alongside of me and some one, I don't know who it was, gave a signal for the engineer to back up. I think it was the foreman, Mr. Steinhouse, and all of a sudden he jumped over and he swung the engineer up very violently, and I kind of stuck my head out and I said "What is the matter" and he said "We hit a man."

Q. Had you ever seen any movements like that before in the yards, previous to this time?

A. It is a common movement, an every day movement in every yard that I have ever been in.

After the train had coupled back they were going three or four miles an hour.

On cross examination by Mr. Plummer, he testified as follows:

Q. How fast was the engine going when the string of cars coupled into this standing string?

Testimony of G. F. GARVIN.

A. That is something I can not say.

Q. Approximately?

A. Just moving up there easy.

Q. Just barely moving?

A. No, after they started to back up they gave the engine some steam and they started to go back. They were going about 3 or 4 miles an hour I should think. About as fast as a man could walk, about like that. That is about the gait it would take.

G. F. Garvin, a witness produced on behalf of the defendant, being first duly sworn, on examination by Mr. Albert testified as follows:

I am in the yard service of the N. P. Have been in the yard service upwards of 20 years, for the Oregon Short line, Colorado Midland. The Butte, Anaconda and Pacific, the Northern Pacific and the Terminal Company at Superior, Wisconsin. I have lived in Spokane 17 or 18 years, running through here and working out of Spokane. I am in charge of the coach yard at the Northern Pacific. I am familiar with the yards at Hillyard. I have had occasion to go there once or twice a month for 7 or 8 years. I have seen them nearly every time I went there, performing switching service. I have heard the testimony here with reference to the way this particular switch movement occurred. I have seen them perform switch movements similar to that they have testified to here today, referring to this particular movement that happened at the time of the accident. In coupling up cars I have observed what the action is on the draw bars, on the slack and on the cars

Testimony of G. F. GARVIN.

generally when a coupling is made. Assuming that the coupling up is with the engine going three or four miles an hour—well, there is generally about two feet of slack in the springs of the cars when they are coupled together, and when the impact goes against them they naturally spring apart so it leaves, with ten cars, I should say probably 20 feet of slack in the springs.

Q. What happens to the far car when the coupling is made when that slack is taken out of it?

A. It runs away with the impact.

Q. What is the movement of the end car?

A. The end car, it starts very suddenly, the spring pressure goes up first before the car moves and then when it moves it moves suddenly.

That is the usual occurrence when you are coupling. It is practical to cut off while a shove is going on.

Whereupon, upon cross examination by Mr. Plummer, he testified as follows:

I heard Mr. Gebhart's description about switching operations that were done at the time this man was killed and I answered that I had seen this kind of similar operation. I think I based that upon the facts that Gebhart testified it was only going about 3 or 3½ miles an hour.

Q. That is the usual custom isn't it?

A. About that.

Q. In other words, the custom in handling these cars is about the speed testified to by Gebhart?

A. That is generally about the speed.

Whereupon, upon re-direct examination, he testified as follows:

Testimony of G. F. GARVIN.

BY MR. ALBERT:

Q. Let us assume, Mr. Garvin, so there won't be any question about this, that they had a string of cars come in on No. 1 track, some eight or ten cars, I think it is and they backed up on a string of eight or ten cars or fifteen, I don't know just which they claim, but I will assume ten cars, with that understanding, on track 1, and they backed into that string of cars and coupled up on it with sufficient force to send that string of cars, the far string of cars, a difference of three or four car lengths as they shoved that through?

THE COURT: Four or five car lengths.

MR. ALBERT: Q. (Continuing) Four or five car lengths, and assume that the end car moved very quickly and caught the man that was passing the end car a distance of, I think in the neighborhood of three or four feet, we will say for the purpose of this question, three or four or a little more, and that there was no man put on the end of the car, the far end of the car, as a warning, and that there was no bell rung or whistle blown, or no notice or warning of any kind other than the fact that the crash of the cars was heard as they were coupled together, I will ask you whether or not you have seen, observed, movements similar to that, with the exception of the fact that the accident happened.

A. Every day.

MR. PLUMMER: Wait. That is objected to. That has to be confined to what he saw in the Hillyard yards.

MR. ALBERT: Yes, sir.

MR. PLUMMER: Yes, not in some other railroad.

Testimony of G. F. GARVIN.

A. Yes sir, I have seen that done in the Hillyard yards.

Q. More than once?

A. Yes, on several occasions.

Whereupon, upon re-cross examination, he testified as follows:

There are about 2 feet of slack in a car, if they are pushed together. In about ten cars we figure you will have 20 feet of slack.

Q. Now, if you were passing across the end of a car and you would hear the crash as the cars came into the end of the string, and immediately the head car moved very violently and very suddenly and you did not hear any continuation of the coupling, taking up of that slack, then you would say the slack was out, wouldn't you?

A. I would say the slack was up. That would be in.

Q. It would take considerable force, wouldn't it, to send those cars suddenly and violently, turn cars on that track, with that suddenness I have described, wouldn't it?

A. No.

Q. Wouldn't use much force?

A. No.

Q. Do you pretend to say that could be done, if an engine was going through at $3\frac{1}{2}$ miles an hour?

A. I do.

Q. So that a man could not get out from behind it?

A. No, I would not say that. I say it moved that way, moved violently, I say, because the slack is there

Testimony of G. F. GARVIN.

and the very minute the forward car moves the hind one has got to move.

Testimony of witness closed.

MR. ALBERT: Defendant rests.

MR. PLUMMER: We rest.

Whereupon the following proceedings were had:

MR. ALBERT:

The defendant now moves the Court to direct a verdict in favor of the defendant on the ground that the evidence has not shown negligence on the part of the defendant, and the evidence does not show any cause of action in favor of the plaintiff and against the defendant under the Employers' Liability Act, or under the common law or under the statutes of the State of Washington, but the evidence shows as a matter of law that at the time and place deceased received the injuries which caused his death, that he knew the dangers of his employment, and was familiar with the movement and manner of work in the yard, and that he assumed the risk thereof. The evidence shows that the accident was caused by the negligence of the deceased, Fred G. Mustell. Further, that the negligence which is covered by the allegations of the complaint has not been shown or sustained by the evidence produced on the trial.

THE COURT:

I think I will let the case go to the jury, and you can have my ruling reviewed by the Circuit Court, or I may review it myself on application.

MR. ALBERT:

In that case that would mean a new trial. We could not get a judgment on it in that way.

MR. PLUMMER:

We will consent that if a verdict should be rendered for the plaintiff in this case, that the Court may consider the motion for a judgment non obstante, and that we will not question the right of the Court to do so. I do this so as to save the necessity for another trial, but to settle it in one trial.

THE COURT: And the same as to the Court of Appeals?

MR. PLUMMER: Yes, sir.

Defendant excepted to the ruling of the Court in refusing to direct a verdict which exception was allowed by the Court.

Whereupon the following proceedings were had:

The defendant moved the Court to withdraw and exclude from the consideration of the jury the question of negligence as to the claim that the movement in question, which resulted in the collision with Mustell, was unusual or extraordinary or a negligent movement, or any negligent handling of the cars, on the ground that there was no evidence to support such charge of negligence, which motion was denied by the Court, to which ruling denying the motion defendant excepted, which exception was allowed.

Whereupon arguments were made to the jury on behalf of the plaintiff and the defendant.

Whereupon the Court instructed the jury.

Whereupon the Court submitted to the jury two forms of verdict, one being as follows:

"We, the jury in the above entitled action, find for the plaintiff in the sum of——Dollars," and instructed

the jury to insert the amount that they find for both plaintiffs, in proportion to the amount of the recovery, as follows: To the widow the sum of_____ Dollars; to the infant child the sum of_____ Dollars, and that these two separate amounts were to make up the amount of their general verdict.

The Court further stated to the jury that in addition to the general verdict for the plaintiff or for the defendant, that he submitted the following special interrogatory, which they should answer:

“Was the train movement which caused the death of Fred G. Mustell a “running switch,” within the intent and meaning of the rules of the defendant company,” and instructed them that they should answer that question yes or no.

Whereupon the defendant excepted to the submission by the Court of the special finding upon the question of running switches and the application of Rule 308, upon the ground that the Court should have submitted special findings upon the other grounds of negligence upon which plaintiff relied.

Thereupon the following proceedings were had:

THE COURT: I was perfectly willing to do that. I did that out of an abundance of caution. As I stated in the forenoon I am perfectly thoroughly convinced in my own mind that it was not a running switch, and I think the jury will say so, so that I think the error will be harmless.

MR. PLUMMER: It couldn't be error because all the Courts have said so.

Whereupon the Court called the jury back for the purpose of instructing them in accordance with the admis-

sion of the counsel for plaintiff that they should not consider the question of pain and suffering.

MR. ALBERT: If the Court is going to bring the jury back, then I shall ask the Court to submit to the jury special findings with reference to the other three grounds of negligence.

THE COURT: You may prepare them and submit them.

Whereupon the jury were called back and charged with reference to the admission that no claim was made for pain and suffering and that they must omit that from their deliberations. The Court stated that he would submit some other questions to be answered by the jury in connection with their other general verdict.

Whereupon the following proceedings were had:

It was agreed between counsel for the respective parties that the form of the special questions to be submitted to the jury should be as follows:

(2) Was it the custom of the defendant to place a man on the head car (when moved), in the manner the car in question did move and did Mustell rely on that custom? Answer——

(3) Were the cars which struck Mustell moved in a manner extraordinary or unusual? Answer——

(4) Was the defendant negligent in failing to provide a rule for the warning of employes such as Mustell? Answer——

(5) Did Mustell assume the risk? Answer——

(6) Was the negligence of Mustell the sole cause of his death? Answer——

Whereupon counsel for the plaintiff stated that he had no objection to submitting these special findings.

Counsel for the defendant stated that he desired to renew his objection to the submission of special findings to the jury after the case was argued; that it was the position of the defendant that no special findings at all should have been submitted to the jury after the argument, without notice to counsel for the respective parties, and that if the Court was going to submit any findings to the jury, then that all the questions should be submitted for their consideration.

Thereupon the jury having received the charge of the Court, and having retired to consider their verdict and special findings, returned into open Court with a verdict in favor of the plaintiff for damages in the sum of \$5750, and apportioned the amount of the recovery to the widow Grace Mustell the sum of \$3450, to the infant child, Ruth Mustell the sum of \$2300, and did find specially with reference to the question submitted to such jury for their special findings as follows:

(1) Was the train movement which caused the death of Fred G. Mustell a "running switch," within the intent and meaning of the rules of the defendant company.

Answer: No.

(2) Was it the custom of the defendant to place a man on the head car when moved in the manner the car in question did move, and did Mustell rely on this custom?

Answer: No.

(3) Were the cars which struck Mustell moved in a manner extraordinary or unusual?

Answer: Yes.

(4) Was the defendant negligent in failing to pro-

vide a rule for the warning of employes such as Mustell?

Answer: No.

(5) Did Mustell assume the risk?

Answer: No unusual risk.

(6) Was the negligence of Mustell the sole cause of his death?

Answer: No.

DEFENDANT'S EXHIBIT 4.

My name is Thomas Farmer. I am now a resident of 310 Sanson Ave., Hillyard, Wash. Am now starting an automobile garage at Reardon, Wash. I was employed by the Great Northern as fireman, brakeman and switchman from Jan. 23, 1910 to Sept. 29, 1913. I was employed as switchman for Great Northern at Hillyard on Sept. 29, 1913. Tom Steinhouse was switch foreman, Louis Picton, Engineer. I was following the engine and Miller was fireman. At about 2:30 o'clock P. M. picked up about 8 or 10 cars, do not remember whether load or empties and started to back them in on Track No. 1. There were about 15 other cars standing on Track No. 1. I do not remember whether I threw switch or whether Steinhouse threw it. Just before cars taken in by us reached cars standing on Track 1, Foreman Steinhouse ordered me to cut cars off and I did so and cars struck the cars standing on No. 1, pumping them back about 4 or 5 car lengths. After I cut the cars off I looked up and saw Fred Mustell lying on right hand side west of track on ground. I did not go over to body which was about 15 cars or more away from me. I hurried to depot to get a stretcher. At time of accident there was no employe or any person on top of

any of the cars, nor before going in nor while going in was the bell rung or whistle blown. Steinhouse was near the depot a few feet at time of accident but right at my side at time he ordered pin pulled. The only signal I heard given was the whistle of another engine which was given after we struck Mustell. We were engaged in switching a train of cars that had just come in. Gephart, yardmaster, was standing talking to Steinhouse at time of accident, I think. I did not go over to body at all. It was later brought to depot. I left the service of the company next day. I was running extra and regular man took my place.

I called at office of Plummer & Lavin, Feby. 21, 1913, in response to letter addressed to me at Reardon, Wash. They told me they wanted nothing but the facts as I saw and knew and nothing but the truth. I have read the statement and it is true and correct and no promise was or is made to me for giving this statement. It is true and correct statement of the facts as I now remember them. I am not acquainted with Mrs. Mustell and have no interest in this case. At numerous times before his death I saw Mustell going through the yard checking cars, weighing cars, taking numbers, seals, records and marking cars.

(Signed) Thomas D. Farmer.

Whereupon the following proceedings were had:

Upon the 29th day of September, 1914, defendant herein served and filed its motion for judgment notwithstanding the verdict, in words as follows:

Now comes the defendant above named, and moves this Court for an order, vacating and setting aside the verdict rendered in said action on the 22nd day of Sept-

ember, 1914, in favor of the plaintiff, and for judgment in favor of the defendant notwithstanding such verdict, upon the following grounds:

1. That neither the evidence nor the testimony shows or tends to show, either directly or indirectly, that the defendant or anyone for whom it was responsible, was guilty of any negligence, but on the contrary conclusively shows that the defendant exercised all the duties imposed upon it by law, and that said defendant used the care required to furnish the plaintiff's intestate a reasonable safe place in which to work.

2. That no cause of action against the defendant, in favor of the plaintiff has been proven.

3. That no cause of action against the defendant has been proven under the Act of Congress relating to the liability of common carriers by railroad to their employes in certain cases, approved April 22nd, 1908, as amended April 5, 1910, known as the Federal Employer's Liability Act.

4. That the evidence and testimony adduced on the part of the plaintiff and also that adduced on the whole case, shows, as a matter of law, that the plaintiff's intestate assumed the risks and dangers to which he was exposed, if any, and that it was part of the consideration of his employment and part of his duty under such employment to assume such risks and dangers, if any there were which directly or indirectly brought about the accident sued upon.

5. That the evidence and testimony shows that the said plaintiff's intestate knew of the danger which caused his injuries, which evidence and testimony conclusively shows, as a matter of law, that plaintiff is not entitled

to a verdict herein, but that the said defendant is and was entitled to a verdict, and is entitled to judgment against the plaintiff.

6. That the evidence does not show that the defendant negligently or carelessly moved the car which came in collision with plaintiff's intestate violently, or with unnecessary violence, or that said movement was unnecessary, or that the violence or manner in which the same was moved was of an extraordinary character or was an unusual manner, or that the collision between said car and said Mustell was caused by reason of negligence or carelessness on the part of the switching crew in handling the switching operations at the time and place when said collision occurred, or that said car was moved without reasonable care by the said defendant.

7. That the jury having found specially with reference to the other particulars alleged in said complaint of negligence on the part of said defendant, and there being no evidence in support of the charge of negligence referred to in the last ground of this motion, no cause of action against the said defendant has been proven or shown herein.

8. That the evidence is insufficient to sustain a verdict for the plaintiff, upon the ground that the evidence and findings of the jury show that upon all other grounds alleged in the complaint, except upon the ground mentioned in Paragraph 6, that the defendant was not negligent and that with reference to such ground the evidence conclusively shows not only that the said car was not moved in a careless, negligent, unusual or extraordinary manner, but does show that said car was moved in the ordinary and usual manner of moving such cars.

This defendant in making this motion for judgment notwithstanding the verdict expressly waives any and all right to a new trial or another trial in this action and makes no motion therefore, and requests that no new trial of said action be granted, but, on the contrary, said defendant makes this motion to vacate and set aside the verdict in favor of the plaintiff and for judgment in favor of the defendant notwithstanding such verdict.

Said motion is based upon the findings and papers on file, upon the minutes of the Court, including not only the clerk's minutes and any notes and memorandum which may have been kept by the judge of this Court in the trial thereof, but also the reporter's transcript of his shorthand notes of said trial.

Dated at Spokane this 29th day of September, 1914.

CHARLES S. ALBERT,

THOMAS BALMER,

Attorneys for Defendant.

Whereupon, upon the 30th day of September, 1914, said motion for judgment notwithstanding the verdict was taken up for hearing by consent of counsel, and said motion was presented to the Court.

Whereupon said Court made its order denying said motion for judgment notwithstanding the verdict, which order is as follows:

This cause coming on to be heard upon defendant's motion for judgment notwithstanding the verdict of the jury, the above named defendant appearing by Chas. S. Albert and Thomas Balmer, its attorneys of record, urging said motion, and the above named plaintiff appearing by Plummer & Lavin, her attorneys, resisting said

motion, and after hearing said motion but no argument thereon, and the Court being fully advised in the premises, it is

ORDERED, that said motion be, and the same is hereby denied, to which ruling defendant excepts and its exception is allowed.

Done in open Court this 1st day of October, 1914.

FRANK H. RUDKIN,

Judge.

Whereupon the said defendant did except to the making of said order, denying said motion for judgment notwithstanding the verdict, which exception was allowed by the Court.

Whereupon on the 2nd day of October, 1914, judgment was entered in favor of the plaintiff and against the defendant, in the following language:

This cause heretofore coming on to be heard in open Court before the Court and a jury, and after the parties had concluded their testimony the Court instructed the jury and the jury retired to deliberate upon their verdict, and thereafter said jury appeared in Court and reported a verdict in favor of the plaintiff and against the defendant in the sum of five thousand seven hundred and fifty dollars (\$5750):

NOW THEREFORE, upon the verdict of said jury and the evidence adduced and the law of the case, and the Court being duly advised in the premises, it is

ORDERED AND ADJUDGED, that plaintiff, Grace Mustell, as administratrix of the estate of Fred G. Mustell do have and recover of and from the above named defendant, the Great Northern Railway Company, the

sum of five thousand seven hundred and fifty dollars (\$5750) and costs and disbursements herein taxed at One Hundred Sixteen and 10-100 Dollars.

Done in open Court this 2nd day of October, 1914.

FRANK H. RUDKIN,
Judge.

Whereupon the defendant excepted to the rendering and entering of the judgment in the above entitled action, ordering and adjudging that the plaintiff herein have and recover from the defendant the sum of five thousand seven hundred and fifty dollars (\$5750), together with costs, dated and entered on the 2nd day of October, 1914, and to said judgment, which exception was allowed by the Court.

Now in the furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be cited, signed and certified by the judge, as provided by law, and filed as a bill of exception.

CHARLES S. ALEBRT,
THOMAS BALMER,
Attorneys for Defendant.

Due service of the within Bill of Exception by a true copy thereof is hereby admitted at Spokane, Washington, this 29th day of Sept., A. D., 1914.

PLUMMER & LAVIN,
Attorneys for Plaintiff.

(Title of Court and Cause).

Order Settling Bill of Exceptions.

Now, on this 8th day of October, 1914, the above cause coming on for hearing on the application of the

defendant to settle the bill of exceptions in said cause; defendant appearing by Charles S. Albert and Thomas Balmer, its attorneys, and the plaintiff appearing by Messrs. Plummer & Lavin, her attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law, and that amendments have been suggested thereto by the plaintiff, and that the time for settling said bill of exceptions has not expired, and the Court having duly allowed said proposed bill of exceptions and the amendments thereto; and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause, together with exceptions thereto, and all the material matters and things occurring upon the trial, except Exhibit 2 introduced in evidence, which is hereby made a part of said bill of exceptions and the clerk of this Court is hereby ordered and instructed to attach the same thereto;

Therefore, upon motion of Charles S. Albert, attorney for the defendant.

IT IS HEREBY ORDERED, that said proposed bill of exceptions, with the amendments allowed by this court, be, and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned, judge of this Court, who presided at the trial of said cause, that it conforms to the truth and that it is in proper form, and that it is a full, true and correct bill of exceptions, and the clerk of this Court is hereby ordered to file the same as a re-

cord in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK H. RUDKIN,
District Judge.

Endorsements: Bill of Exception.

Received at Clerk's office September 29, 1914, and filed, after being settled and certified to by the Court, October 8, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Assignments of Errors.

Comes now the defendant, and files the following assignment of errors; upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the judgment made by this Honorable Court upon the 2nd day of October, 1914 in the above entitled cause.

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the motion of the defendant to direct a verdict in favor of the defendant, made at the close of all the evidence in the case, for the following reasons:

1. That the evidence did not show any negligence on the part of the defendant.
2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.
3. That the evidence did not show any cause of

action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

II.

That the Court erred in denying defendant's motion for judgment notwithstanding the verdict, upon the following grounds:

1. That the evidence did not show any negligence on the part of the defendant.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, under the Federal Employer's Liability Act.

3. That the evidence did not show any cause of action in favor of the plaintiff under the common law, or under the statutes of the State of Washington.

4. That the evidence showed, as a matter of law, that at the time and place the deceased received the injuries which caused his death, he knew the dangers of his employment, was familiar with the movement and manner of work in the yards, and that he assumed the risk thereof.

5. That the evidence showed that the accident was caused by the negligence of said Fred G. Mustell.

6. That the negligence alleged in the complaint was not shown to have been sustained by the evidence produced on the trial.

III.

That the Court erred in ordering judgment to be entered in said action, in favor of the plaintiff and against the defendant.

IV.

That the Court erred in rendering and entering judgment in said action in favor of the plaintiff and against the defendant.

WHEREFORE, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed, and that said District Court be directed to enter judgment in said action in favor of said defendant.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Plaintiff in Error, Defendant in the Lower Court.

Due service of the within assignment of errors by true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, A. D., 1914.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff.

Endorsements: Assignment of Errors.

Filed October 3, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Petition for Order allowing writ of Error.

Defendant in the above entitled cause feeling itself aggrieved by the rulings of the Court and the judgment entered on the 2nd day of October, 1914, complains in the record and proceedings had in said cause and also of the rendition of the judgment in the above entitled cause in said United States District Court, against said defendant on the 2nd day of October, that manifest error hath happened to the great damage of said defendant, petitions said Court for an order allowing the said defendant to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated this 3rd day of October, A. D., 1914.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Defendant.

Due service of the within petition by a true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff.

Endorsements: Petition for Writ of Error.

Filed October 3, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

At a stated term, to-wit, the September Term, A. D. 1914, of the District Court of the United States of America of the Ninth Judicial Circuit, in and for the Eastern District of Washington, Northern Division, held at the Court Room in the City of Spokane, Washington, on the 3rd day of October, A. D. 1914.

Present Hon. Frank H. Rudkin, District Judge.

(Title of Court and Cause).

Order Allowing Writ of Error.

Upon motion of Charles S. Albert and Thomas Balmer, Esqs., attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors:

IT IS ORDERED, that a writ of error be, and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at the sum of twelve thousand dollars (\$12,000), which said bond may be executed by said defendant as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this Court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted, pending the determination of such writ of error.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within Order by a true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, A. D. 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Order Allowing Writ of Error.
Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Order Allowing Bond.

Defendant, Great Northern Railway Company, having this day filed its petition for a writ of error from the rulings, decisions and judgment made and entered in said action to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having been this day duly allowed;

NOW THEREFORE, IT IS ORDERED, that upon the said defendant, Great Northern Railway Company, filing with the clerk of this Court a good and sufficient bond in the sum of Twelve Thousand Dollars (\$12,000), to the effect that if the said Great Northern Railway Company, plaintiff in error, shall prosecute said writ of

error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 3rd day of October, 1914.

(Signed) FRANK H. RUDKIN,
District Judge.

Due service of the within order by a true copy thereof, is hereby admitted at Spokane, Washington, this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Order Allowing Bond on Writ of Error.

Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Writ of Error—(Lodged Copy).

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the September 1914 term thereof, between Grace Mustell, an Administratrix of the Estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased,

for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively, of said Fred G. Mustell, deceased, plaintiff, and the Great Northern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, plaintiff in error, as by its complaint appears;

We being willing, that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the 1st day of November next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to Correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 3d day of October, 1914, of the Independence of the United States the one hundred thirty-ninth year.

(Seal) (Signed) W. H. HARE,

Clerk of the District Court for the Eastern District of Washington, Northern Division.

Allowed by

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within writ of error and receipt of copy thereof is hereby admitted this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Defendant in Error.

Endorsements: Writ of Error—(Lodged Copy).
Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, in the full and just sum of twelve thousand dollars (\$12,000), to be paid to the said Grace Mustell as Administratrix of the Estate of Fred G. Mustell, deceased, for which payment well and truly to be made, we bind ourselves, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 3rd day of October, 1914.

WHEREAS, lately at the September Term, A. D. 1914 of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said Court between Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, de-

ceased, and as the personal representative of said Fred G. Mustell deceased, for and behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively, of said Fred G. Mustell, deceased, plaintiff, and the Great Northern Railway Company, defendant, a final judgment was rendered against the said defendant, and the said defendant Great Northern Railway Company, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased, for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child, respectively, of said Fred G. Mustell, deceased, is about to be issued, citing and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if the said Great Northern Railway Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) GREAT NORTHERN RAILWAY COMPANY,

By CHARLES S. ALBERT & THOMAS BALMER,
Its Attorneys.

(Signed) NATIONAL SURETY COMPANY,

By JAMES A. BROWN,

Resident Vice President.

F. L. JONES,

Resident Assistant Sec'y.

Plaintiff is satisfied with the within bond and the surety thereon.

Attorneys for Plaintiff.

The foregoing bond is approved as to form, amount and sufficiency of surety this 3d day of October, 1914.

(Signed) FRANK H. RUDKIN,

Judge of the United States District Court, Eastern District of Washington, Northern Division.

Due service of the within bond by a true copy thereof is hereby admitted at Spokane, Washington, this 3d day of October, 1914.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff.

Endorsements: Bond on Writ of Error.

Filed October 3, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

CITATION ON WRIT OF ERROR—(Lodged Copy).

The President of the United States, to Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, and to Messrs. Wm. H. Plummer and Joseph Lavin, her attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the

date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Grace Mustell, as Administratrix of the Estate of Fred G. Mustell, deceased, and as the personal representative of said Fred G. Mustell, deceased, for and on behalf of Grace Mustell and Ruth Mustell, the widow and minor child respectively, of said Fred G. Mustell, deceased, is plaintiff and you are defendant in error and the Great Northern Railway Company is defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 3d day of October, A. D. 1914, and the Independence of the United States the one hundred thirty-ninth year.

(Seal) (Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division.

Attest: W. H. HARE, Clerk.

Due service of the within citation by true copy thereof is hereby admitted at Spokane, Washington, this 3d day of October, A. D. 1914.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

Endorsements: Citation—(Lodged Copy).

Filed October 3, 1914.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Praecipe.

To the Clerk of the Above Entitled Court:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore perfected and allowed to said Court, which record shall be transmitted in printed form to the Clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following files, proceedings and papers on file:

Amended Complaint.

Answer to Amended Complaint.

Reply

Verdict and Special Findings.

Plaintiff's Motion for New Trial.

Defendant's Motion for Judgment Notwithstanding Verdict.

Order Denying Motion for New Trial.

Order Denying Motion for Judgment Notwithstanding the Verdict.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Citation on Writ of Error.

Stipulation as to Making up Record.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Plaintiff in Error.

Endorsements: Praecipe.

Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Stipulation.

IT IS HEREBY STIPULATED BETWEEN the plaintiff, by her attorneys, and the defendant by its attorneys that the transcript of the record on the writ of error in the above entitled cause, shall be made up of the following papers:

Amended Complaint.

Answer to Amended Complaint.

Reply.

Verdict and Special Findings.

Plaintiff's Motion for New Trial.

Defendant's Motion for Judgment Notwithstanding the verdict.

Order Denying Motion for New Trial.

Order denying Motion for Judgment Notwithstanding the Verdict.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Stipulation as to making up Record.

Dated this 6th day of October, 1914.

PLUMMER & LAVIN,

Attorneys for Defendant in Error and Plaintiff.

CHARLES S. ALBERT and THOMAS BALMER,

Attorneys for Plaintiff in Error and Defendant.

Endorsement: Stipulation.

Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

(Title of Court and Cause).

Stipulation.

IT IS HEREBY STIPULATED by plaintiff in error by its attorneys and by defendant in error by her attorneys, that in printing the record in the above entitled action, the clerk shall cause the following to be printed for the consideration of the Court on Appeal:

Amended Complaint.

Answer to Amended Complaint.

Reply.

Verdict and Special Findings.

Plaintiff's Motion for New Trial.

Defendant's Motion for Judgment Notwithstanding the verdict.

Order Denying Motion for New Trial.

Order denying Motion for Judgment Notwithstanding the Verdict.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Stipulation as to making up Record.

IT IS FURTHER STIPULATED, that in printing the said record, there may be omitted therefrom the title of the Court and cause on all papers, excepting the first page, and that in lieu of said Court and cause there be inserted in the place and stead thereof, the following words, "Title of Court and Cause."

Dated this 6th day of October, 1914.

(Signed) CHARLES S. ALBERT,

(Signed) THOMAS BALMER,

Attorneys for Defendant and Plaintiff in Error.

(Signed) PLUMMER & LAVIN,

Attorneys for Plaintiff and Defendant in Error.

Endorsement: Stipulation as to Printing Record.

Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1914.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD.

UNITED STATES OF AMERICA,

Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington,

do hereby certify the foregoing printed pages, numbered from 1 to 123, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, bill of exceptions, and other proceedings in the above and foregoing entitled cause, as is necessary to the Writ of Error therein, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and as is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same which I transmit herewith constitute my return to the annexed Writ of Error lodged and filed in my office on the 3rd day of October, 1914.

I further certify that I herewith transmit plaintiff's original exhibit 2, the same being map of premises showing location of tracks, buildings, yards, etc., which original exhibit I herewith transmit pursuant to order of Court so to do.

I further certify that I hereto attach and herewith transmit the Original Citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$167.80, and that the same has been paid to me by Charles S. Albert and Thomas Balmer, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane, in the Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 26th day of October, 1914, and in the Independence

of the United States of America, the one hundred and thirty-ninth.

(Seal) (Signed) W. H. HARE,
Clerk, U. S. District Court for the Eastern District of
Washington.

